Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

KATIE R. HARDIN,

Petitioner,

v.

S.C. JOHNSON & SON, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In analyzing a claim of unlawful discrimination involving the intersection of both race and gender made by a black female employee, was it improper to compare the black female's treatment only with that of black men and white women?

In evaluating a claim of hostile work environment based on race **and** sex discrimination, are the racial and sexual comments made by an immediate supervisor on and off the workplace premises, even if not directed to or heard by the plaintiff, relevant to the issue of the general pervasiveness of harassment in the workplace?

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Petitioner, Katie Hardin, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was issued on January 28, 1999, [Appendix A] The opinion and order of the United States District Court for the Eastern District of Wisconsin was issued on April 1, 1998. [Appendix B] The Recommendation to the United States District Court for the Eastern District of Wisconsin was issued on March 9, 1998. [Appendix C] The order denying the petition for rehearing was issued by the United States Court of Appeals for the Seventh Circuit on March 15, 1999. [Appendix D]

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 28, 1999. [Appendix A] The Court of Appeals denied a timely petition for rehearing on March 15, 1999. [Appendix D]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with regard to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin, or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 1981 provides:

(a) Statement of Equal Rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and Enforce Contracts" Defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification and termination of

contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

STATEMENT OF THE CASE

In 1995, petitioner Katie Hardin filed this action in the United States District Court for the Eastern District of Wisconsin, alleging that she was discriminated against by the conduct of her employer, S.C. Johnson & Son, Inc., and by the acts and conduct of her employer's agent, Nels Andersen. The conduct consisted of harassment because of petitioner's race and gender and it resulted in a hostile work environment. Petitioner's action was brought pursuant to 42 U.S.C. §§ 1981(a) and (b) and Title VII, 42 U.S.C. § 2000(e)-(2).

The petitioner is a black female. She began working for defendant in 1972 as an hourly production worker in its Sturdevant, Wisconsin facility. In 1988, petitioner was transferred to Line 374, an assembly line that produced products packaged in aerosol spray cans.

The Line Chief for Line 374 in 1988 was Nels Andersen. He was responsible for keeping production on schedule, for scheduling vacations and overtime, for monitoring employee break periods and for keeping the machinery operating. Anderson was a very crude person. He used expletives at the workers. He threw tools at the workers and he barraged petitioner with such unsavory statements as "what the hell are you doing?" and "get your head out of your ass." He referred to petitioner as a "dumb motherfucker". In 1989, petitioner and three other female workers initially complained to their supervisor, Ronald

Klimowicz, that Andersen was disrespectful, cursed at them and threw objects at them. Andersen was told that there was no need for profanity in the workplace.

In 1993, respondent reorganized its production operation into a self-directed team operation, in which groups of multi-task teams were organized around the completion of manufacturing tasks. The position of Line Chief was eliminated. The assembly line consisted of 10 males, including two black males, and three black females, including the petitioner. There were no regular full-time white females on line 374. At times, temporary workers from an outside company, including white females, were sent to the line.

Andersen continued cursing at the women and behaving boorishly. He put his hands on petitioner and touched her and "massaged" her shoulders in a manner which petitioner found offensive and intimidating. This was witnessed by other employees, who also heard the petitioner tell Andersen to keep his hands off her. Another black female worker told the supervisor that she felt that Andersen singled her out for abusive treatment because of her gender and race. Expressing concern that Anderson treated women on the line differently, the supervisor again warned Andersen and told him to avoid the petitioner unless he had to speak to her. No formal disciplinary action was taken against Andersen.

Andersen's conduct toward petitioner and the other black women did not stop. Petitioner continued to complain to her supervisor, and when no action was taken against Andersen, she filed a written complaint with Human Resources stating that Andersen was sexually harassing her

and that he did not harass the men, only the women on the line. Andersen received a written warning. Other black females also complained to the supervisor, indicating that they felt that Andersen had a problem dealing with black women. Andersen's harassment continued to be directed at the black women on the line. On shift change-overs, Andersen would demand to know "where the hell are the women at?" and would go look for them. He continued to yell abusively at the black women on the line. He did not yell at white women temporary workers and he did not curse at other men.

In 1995, petitioner again complained to her supervisor and to Human Resources about Andersen's harassment of her, stating that she perceived that she was being treated differently by Andersen because she is a black woman. By this time, petitioner was experiencing mood swings, crying spells and sleep disorders. A member of defendant's diversity committee called William Perez, defendant's president, and told him that petitioner was being stressed out as a result of Andersen's treatment of her. He stated to Perez that if it was a black man doing it to a white female, the black man would be fired. Petitioner herself complained to Mr. Perez, indicating that Andersen was harassing her, that she felt threatened and intimidated, and that she was afraid. Mr. Perez told petitioner that he would check into the matter and advised her to seek the company psychologist.

Andersen's conduct became physically threatening to petitioner. He drove an electric cart up behind her and failed to sound the horn. He slammed the door in her face numerous times. He interfered with her leaving the parking lot by cutting her off in his car. Andersen was eventually transferred to another line.

A. Evidence Of Andersen's Comments In The Workplace

Peggy Brannon is a white female who worked as a temporary employee from an outside company on Line 374 from July, 1991 to December, 1993. She knew Andersen, the petitioner and the black females on the line. From early 1993 until October, 1994, Ms. Brannon dated Andersen, spending time at his apartment and on his boat. While she routinely heard Andersen refer to petitioner and the other black females as "stupid black bitches" and "stupid niggers". When a particular machine on the line broke down, Ms. Brannon heard Andersen directly refer to petitioner as a "stupid black bitch". Based on her observations in the workplace while working on Line 374, Ms. Brannon stated that she and others routinely heard Andersen refer to petitioner as a "stupid black bitch", a "stupid nigger bitch", and a "fucking black bitch". Ms. Brannon indicated that Andersen's comments were common knowledge to all persons working on the line. She indicated that when she worked on Line 374, she never saw Andersen exhibit any vulgarity towards her or other white female workers.

After petitioner filed a complaint about Andersen with Human Resources, Ms. Brannon heard Andersen indicate that "this stupid black bitch" was trying to get him fired. After Ms. Brannon and Andersen moved into an apartment together, she heard Andersen describe petitioner as a "black cunt". Ms. Brannon subsequently severed her relationship with Andersen.

On June 13, 1995, petitioner filed a complaint with the Wisconsin Department of Industry, Labor and Human Relations' Equal Rights Division (ERD), alleging sexual and racial discrimination. On September 8, 1995, she received a right to sue letter, and on September 14, 1995, she brought a cause of action in the United States District Court for the Eastern District of Wisconsin.

THE PROCEEDINGS BELOW

On November 1, 1996, respondent filed a motion for summary judgment, arguing (1) that the alleged misconduct was neither sexual nor racial in nature and was neither severe enough nor pervasive enough to constitute an actionable hostile work environment; (2) that even if Andersen's conduct constituted a hostile work environment based on race and gender, defendant is not liable because it responded reasonably to the petitioner's complaints; and (3) that petitioner's § 1981 claim must fail because Andersen's actions were not racially motivated and petitioner was not subjected to treatment that was not imposed on white employees.

The Magistrate Judge's Recommendation

The magistrate judge first found that under Title VII, petitioner could not allege facts that occurred prior to 300 days before she filed her complaint with ERD. The magistrate judge rejected petitioner's argument that Andersen's conduct was continuous from 1988 to 1995, but indicated that Wisconsin's six-year statute of limitations applies to § 1981 actions, so acts occurring after June 12, 1989 could be brought under that claim.

With respect to petitioner's Title VII hostile environment sexual harassment claim, the magistrate judge rejected the argument that the court must consider what is offensive and hostile to a reasonable woman regardless of whether Andersen treated male and female employees alike. The magistrate judge stated that while Andersen's conduct was reprehensible, it was not taken against petitioner because of her gender and did not constitute actionable sexual harassment. This opinion was based on the acts committed by Andersen within the limitations period:

allowing a door to close in petitioner's face, startling her by approaching her from behind without warning in an electric cart, and cutting her car off in the company parking lot. The magistrate judge found that Andersen was equally disrespectful to men and women, so petitioner could not show that Andersen verbally abused her because she is a woman.

With respect to petitioner's Title VII hostile environment racial harassment claim, the magistrate judge, relying on the same three acts, stated that there was no evidence that these acts were done because of petitioner's race. The magistrate judge noted the affidavit by Ms. Brannon, which indicates that Andersen routinely referred to petitioner as "stupid black bitch", "stupid nigger bitch", "fucking black bitch", and "black cunt", but erroneously stated that these comments were made off the work premises and lack sufficient nexus to establish a hostile work environment.

With respect to petitioner's § 1981 claim for racial discrimination, the magistrate judge stated that blacks and whites were treated with equal disrespect by Andersen, so the petitioner failed to present a *prima facie* case of race discrimination.

The magistrate judge recommended that respondent's motion for summary judgment be granted, and the district court adopted this recommendation.

The Decision Of The Court Of Appeals For The Seventh Circuit

On appeal, the Court of Appeals for the Seventh Circuit affirmed the district court's decision, agreeing with the district court that the continuing violation doctrine was inapplicable, thus eliminating the most damaging evidence

of harassment by Andersen, particularly the racist statements made to Brannon about the petitioner. The Court of Appeals further stated that these statements were made outside the workplace, but noted that "were such noxious statements relevant to the record we considered — if in fact Andersen spoke them in the workplace or to Hardin's face within the limitations period — the thrust of this opinion could be markedly different." [Appendix A, p. 6]

With respect to the petitioner's Title VII claims, the Court of Appeals found nothing inherently racial or sexual about Andersen's language or his acts or that petitioner was singled out for abusive verbal treatment. The Court of Appeals found that Andersen had not made the workplace less congenial for women or blacks than he had for men or whites.

With respect to petitioner's § 1981 claim, the Court of Appeals stated that there was no direct evidence that the defendant acted upon racially discriminatory motives. Moreover, the Court of Appeals stated that the comments in Brannon's affidavit were not time-barred for § 1981 purposes, but again stated that they were not made in the workplace. The Court of Appeals stated that Andersen was not a workplace decision maker, so even if his statements were made in the workplace, they could not provide the basis for a determination of discrimination. The Court of Appeals again, following the same analytical model of proof as for Title VII, stated that petitioner could not point to a similarly situated white employee who was treated more favorably by the defendant, since blacks and whites were treated with equal disrespect by Andersen.

REASONS FOR GRANTING THE WRIT

The analysis used by the Seventh Circuit Court of Appeals conflicts with the analysis used by Courts of Appeals in the Fifth Circuit, Ninth Circuit and Tenth Circuit.

The decision of the Seventh Circuit Court of Appeals conflicts with this Court's prior rulings regarding the vicarious liability of an employer for the creation of a hostile work environment by a supervisor.

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION OF THE SEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH RULINGS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL WITH REGARD TO ANALYZING THE REQUIREMENTS FOR DETERMINING WHETHER A HOSTILE WORK ENVIRONMENT BASED ON RACE AND SEX EXISTED

Other than the occasional white temporary worker from an outside company, there were no white females on Line 374. It consisted of black men, white men and black women. The Seventh Circuit Court of Appeals found that the Andersen's conduct was neither sexually nor racially discriminatory because petitioner could not point to a similarly situated white employee who was treated more favorably. Under this analytical model of proof, there was no similarly situated white employee with whom to compare the petitioner, so she was compared to black men and white men.

But this analytical model is in conflict with the analytical model of proof used in the Fifth Circuit Court of Appeals, the Ninth Circuit Court of Appeals and the Tenth Circuit of Appeals. This was the very issue in *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995), where the plaintiff's supervisor was abusive to both men and women, but the abuse towards the women was of a sexual and gender-specific nature. It included referring to the plaintiff as a "dumb fucking broad", "cunt", and "fucking cunt". The district court granted summary judgment to the defendant, but the Ninth Circuit Court of Appeals held that the district court erred in accepting the argument that the supervisor's treatment of men and women was equally abusive. The Court of Appeals noted that while the supervisor was abusive to men, his abuse of women was different and relied on sexual epithets, offensive, explicit references to women's bodies and sexual conduct. The Court of Appeals stated that even if the supervisor was abusive to men, a court must consider what is offensive and hostile to a reasonable woman.

Similarly, in the case at bar, Andersen's abuse of black females was different from that of black males and white females. It relied on sexual epithets such as "fucking black bitch". It relied on offensive, explicit references to women's bodies, such as "black cunt". His comments were sexual and gender-specific, and the Court of Appeals should have only considered what is offensive and hostile to a reasonable black woman in the circumstances. Although *Steiner* is a Ninth Circuit case, certiorari was denied by the United States Supreme Court. Instead of following this analytical model of proof, the Seventh Circuit improperly compared a black female to black men and white females.

Furthermore, by using the analytical model that it used, the Seventh Circuit Court of Appeals violated the spirit, if not the letter, of Title VII. This Court has indicated that the language of Title VII, which prohibits an employer from discriminating against an individual because of race, color, religion, sex, or national origin, makes plain the purpose of Congress to assure equal employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

This Court has also stated that the purpose of Title VII is "the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158 (1971). By prohibiting discrimination ***because of race or sex***, Congress intended to prohibit employment discrimination based on any or all impermissible characteristics. *See Jefferies v. Harris Co. Community Action Ass'n.*, 615 F.2d 1025, 1032 (5th Cir. 1980). It is clear that an employer may not treat "some people less favorably than others because of their race, color, religion, sex, or national origin." *Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977).

Recognition of black females as a distinct protected subclass was made in *Jefferies*, where a black female employee brought a claim for race and sex discrimination when her employer failed to promote her but promoted a black man. The district court dismissed her claims and she appealed,

contending that the court erred in failing to consider her claim of discrimination based on both race and sex. She argued that an employer should not escape from liability for discrimination against black females by showing that it does not discriminate against blacks and it does not discriminate against females. The Fifth Circuit Court of Appeals held that the district court improperly failed to address her claim of discrimination on the basis of both race and sex, stating that discrimination against black women can exist even in the absence of discrimination against black men or white women. 615 F.2d at 1032.

The court in *Jefferies* held that an employer cannot single out black women for discriminatory treatment, stating that it is beyond belief that, while an employer may not discriminate against married women, women with young children, or single pregnant women, an employer could be allowed to discriminate against black women as a class. The court stated that recognition of black females as a distinct protected subgroup for purposes of the prima facie case and proof of pretext is the only way to identify and remedy discrimination directed toward black females. The court stated that

> [i]f both black men and white women are considered to be within the same protected class as black females for purposes of the *McDonnell Douglas* prima facie case and for purposes of proof of pretext after an employer has made the required showing of a legitimate, non-discriminatory reason for the adverse employment action, ***no remedy will exist for discrimination which is directed only toward black females.***

Id. [emphasis added] The court held that when a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the black female plaintiff. *Id.* at 1034. The court stated that the fact that the man who was promoted was black does not bring him within the plaintiff's protected class for purposes of her prima facie case, and held that black males and white females must be treated as persons outside plaintiff's class.

In *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969), where the company refused to hire women with preschool-age children while hiring men with such children, the idea that disparate treatment of a sub-class of women could constitute a violation of Title VII was rejected. But the United States Supreme Court held that § 703(a) of the Civil Rights Act of 1964 "requires that persons of like qualifications be given employment opportunity irrespective of sex." *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544, 91 S. Ct. 496, 497-8, 27 L. Ed. 2d 613 (1971).

In *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987), a black female security guard brought an action for racial and sexual harassment against her employer. She was the only black woman on the security force and she alleged that she was subjected to an atmosphere of racial slurs and jokes. Some comments were directed to her personally and some comments were general references to blacks as "niggers" and "coons". The district court rejected her claims, but on appeal, the Tenth Circuit Court of Appeals addressed the issue of whether, in determining the pervasiveness of the harassment against a plaintiff, a trial

court may aggregate evidence of racial hostility with evidence of sexual hostility. Citing *Jefferies*, the court answered the question in the affirmative. Noting that her supervisor had made serious racial slurs against blacks, the court held that the racial and sexual harassment evidence should be combined in determining whether there was a pervasive discriminatory atmosphere, creating a hostile work environment.

In *Lam v. University of Hawaii*, 50 F.3d 1551 (9th Cir. 1994), an Asian female alleged discrimination on the basis of race, sex and national origin in failing to promote her. The district court granted summary judgment to the defendant. On appeal, the Ninth Circuit Court of Appeals noted that a prima facie case of unlawful employment discrimination on the basis of protected characteristics may be established through indirect evidence under *McDonnell Douglas Corp*. The court stated that even the school's favorable treatment of other Asian women would not necessarily defeat the plaintiff's claim at trial or on summary judgment, since such evidence creates a genuine dispute as to a material factual question.

The court held that the district court erred in separately treating the claims of racial and sex discrimination, noting that where two bases for discrimination exist, they cannot be neatly reduced to distinct components. The court stated that rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experience. Citing *Jefferies*, the court held that when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it

discriminates against people of the same race or of the same sex. 50 F.3d at 1561-1562. Legal commentators have supported this principle. *See* K. Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscriminatory Doctrine, Feminist Theory and Antiracist Politics. 1989 *U.Chi. Legal F.* 139. As noted in *Connecticut v. Teal*, 457 U.S. 440, 455, 102 S. Ct., 2525, 2535, 73 L. Ed. 2d 130 (1982), "Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired."

In *Lam*, the court stated that like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women, so that as a consequence they may be targeted for discrimination even in the absence of discrimination against Asian men or white women. The court indicated in a footnote that the district court's approach reduced discrimination against Asian women to discrimination against Asian men plus discrimination against white women. The court stated that the inherent fallacy of this approach is obvious when one considers that discrimination against white men could be similarly analyzed, using the same models: Asian men plus white women. 40 F.3d at 1562, n.19.

In addition, because of its flawed analytical approach, the Seventh Circuit Court of Appeals again failed to consider the statements made by Andersen in the workplace from 1988 and which created the overall atmosphere of race and sex discrimination under which the petitioner was forced to work simply because she is a black female. The absence of discrimination against black men, white men or white

women is irrelevant to the issue here and should not have been considered by the Seventh Circuit Court of Appeals. The only issue that should have been addressed is whether the petitioner was discriminated against ***because of her race and her sex***. A consideration of the statements made by Andersen in the workplace from 1988 to 1995 was mandated in order to determine the pervasiveness of the discriminatory atmosphere under which the petitioner had to work every day.

In the case at bar, the magistrate judge, the district court and the Seventh Circuit Court of Appeals applied the same fallacious analytical model — it compared a black female to black men and white women. The Seventh Circuit Court of Appeals rejected the holdings in *Steiner*, *Jefferies*, *Phillips*, *Hicks*, and *Lam*, and improper held that because the petitioner could not specifically point to a similarly-situated white female who was treated differently from her, she could not establish a *prima facie* case of discrimination.

The only relevant question that should have been considered by the courts below is: Did the harassment happen to petitioner because she is a black female? Whether or not there was harassment of black men or white females is irrelevant for purposes of making out a *prima facie* case of race and sex discrimination here. Because the Seventh Circuit Court of Appeals based its decision on its perception that women and men were all treated the same by Andersen, therefore comparing his treatment of a black female with his treatment of black men and white women, its analysis was flawed and is in conflict with the decisions of other circuit courts of appeal. Accordingly, this petition should be granted.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE VICARIOUS LIABILITY OF AN EMPLOYER FOR A SUPERVISOR'S CREATION OF A HOSTILE WORK ENVIRONMENT

The opinion of the Seventh Circuit Court of Appeals conflicts with this Court's prior rulings with regard to the vicarious liability of an employer for the creation of a hostile work environment by a supervisor. In its opinion, the Seventh Circuit Court of Appeals stated that because petitioner's immediate supervisor "was not a workplace decision maker", his statements could not provide the basis for a determination of discrimination.

In *Burlington Industries v. Ellerth*, 524 U.S. __, 118 S. Ct. __, 141 L. Ed. 2d 633, 655 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. __, 118 S. Ct. __, 141 L. Ed. 2d 662, 689 (1998), both brought under Title VII, this Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee." In *Faragher*, the employees who sexually harassed a female lifeguard were immediate male supervisors responsible for making lifeguard's daily assignments and for supervising their work and the fitness training. In the case at bar, the employee who harassed petitioner was her immediate supervisor on the work line, who was responsible for her daily assignments and for supervising her work.

Because the Court of Appeals came to the erroneous conclusion that only the comments of a decision-making supervisor can form the basis for a determination of discrimination, it did not address the fact that the supervisor's comments were routinely uttered in the workplace and were not just made to his girlfriend outside the workplace. Concluding that the comments were not made in the workplace, the court was doubtful of their admissibility. But the evidence established that the supervisor routinely made the obnoxious comments ***at work*** as well as at home. Had it properly dealt with this issue, the court could only have come to the conclusion that even if petitioner herself did not hear the derogatory remarks, the remarks evidence the sexual/racial purpose behind the conduct and behavior of her supervisor, which is sufficient to support a Title VII claim.

The Court of Appeals noted that had the statements been made in the workplace, the thrust of the opinion could have been markedly different. By concluding that Andersen had not made the comments in the workplace, the court failed to properly deal with the impact of the statements on the workplace. In *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), this Court found that separate educational facilities for black and white children were inherently unequal and that the policy of separating the races was usually interpreted as denoting the inferiority of blacks.

In the case at bar, black women were routinely subjected to the same kind of demeaning conduct in the workplace solely because of one person's perception of black women as inferior and unequal. The noxious statements were made in the workplace to others and not to the black women

directly. The routine and ongoing statements had the purpose and effect of demeaning the black women *per se*. Does the undermining and demeaning of other employees because of race create a hostile work environment because of race? Even if they were not made directly to the petitioner, there can be no question that the comments expressed by Andersen in the workplace created an atmosphere of sexual and racial stigma on Line 374. Petitioner was forced to work in a pervasive atmosphere of general hostility. Is it really necessary to be called a "stupid nigger bitch" to one's face in order to be discriminated against in the workplace?

The Court of Appeals indicated that the continuing violation doctrine is inapplicable here, excluding evidence of the conduct of Andersen that occurred before the 300-day limitations period. But there can be no doubt that the facts established that petitioner felt harassed on the line as early as 1988 and that the harassment continued through 1995. The Court of Appeals held that petitioner could not reach back and rely on evidence of incidents occurring prior to the 300 days before she filed her ERD complaint. This eliminated much of the most damning evidence against Andersen for purposes of petitioner's Title VII claim — the evidence in Ms. Brandon's affidavit that she routinely heard Andersen refer to the black women on Line 374 as "stupid black bitches", "stupid nigger bitches" and "fucking black bitches", and that when a machine broke down, she heard Andersen refer directly to petitioner as a "stupid black bitch". Ms. Brandon routinely heard such comments from July 1991 until she ended her relationship with Andersen in 1994. Although many of these comments were made in the workplace, the extent of it was latent and it was only through discovery after the complaint was filed that it became fully known to petitioner.

The Court of Appeals relied on the "continuing violation doctrine" to exclude this evidence of discriminatory treatment, basing its decision on its holding in *Galloway v. General Motors Service Part Operation*, 78 F.3d 1164, 1167 (7th Cir. 1996), that a victim of actual harassment "cannot reach back and base her suit on conduct that occurred outside the statute of limitations." *See also Dasgupta v. University of Wisconsin Board of Regents*, 121 F.3d 1138 (7th Cir. 1997). But the 300-day limitation period is not a statutory approach; it is a judicial creation. In a situation such as the one at bar, it becomes a limitation that is arbitrary and rigid and frustrates the public policy and purposes of Title VII, which is to eliminate all vestiges of unlawful discrimination in the workplace.

The Court of Appeals held that petitioner could reach back for the 42 U.S.C. § 1981 claims. The central issue is that the policy of eliminating evidence beyond the 300 day period even though that evidence is probative on the issues involved does not afford the petitioner a trial on the merits, since the most damaging evidence, and the evidence that established the general atmosphere of harassment pervading the workplace, was eliminated.

The use of the continuing violation doctrine to preclude the admissibility of this evidence, which was not discovered until after the complaint was filed and discovery was completed, also frustrates Fed. R. Ev. 402, which provides for the admission of all relevant evidence and Fed. R. Ev. 403, which provides for the admission of evidence if its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative

evidence. The evidence presented in Ms. Brandon's affidavit is probative on the issue of the hostility that pervaded the petitioner's work environment and on the issue of the racial motivation of Andersen's conduct. Clearly, the inflexibility of the Seventh Circuit Court of Appeals in applying the continuing violation doctrine represents an artificial, arbitrary and capricious delineation which frustrates the entire public purpose and policy of Title VII, especially since many of the manifestations and flowering of discrimination do not blossom fully at the time the discrimination occurs.

As was noted by the Ninth Circuit Court of Appeals in questioning whether a requirement exists that a discrete discriminatory act occur within the relevant period of limitations in all cases arising under the continuing violation theory in *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108, n.1 (9th Cir. 1998), "we reserve decision as to whether requiring such a showing is appropriate in the context of a hostile work environment claim, ***given that a hostile work environment is ambient and persistent, and that it continues to exist between overt manifestations***." [Emphasis added]

Analyzing The Hostile Work Environment Claim

All the courts below determined that the petitioner was not subjected to a hostile work environment. The essence of a hostile work environment claim is that it is the ***work environment*** that is hostile. Therefore, evidence of a general work atmosphere is an important factor in evaluating a hostile work environment claim. *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987). In *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd in part, rev'd. in part*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), the D.C. Court of Appeals held that no evidence of sexual

harassment directed specifically toward the plaintiff was necessary for a claim under Title VII, stating "Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere where such harassment was pervasive." In *Rogers v. Equal Employment Opportunity Comm'n.*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d 343 (1972), the same result was obtained in a Title VII racial discrimination case. In the case at bar, the obnoxious and derogatory comments made by Andersen about petitioner were not always made to her directly. But the general hostility fostered by the uttering of these comments in the workplace resulted in a pervasive atmosphere of harassment in which she was forced to work.

The complained of conduct need not be explicitly sexual or racial; it is sufficient if the harassment is discriminatory in ***character or purpose***. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989). In determining whether the employer's conduct is discriminatorily motivated, the court should consider the racial mix of the employer's work force. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 580, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978). In *Oncale v. Sundowner Off Shore Services*, 523 U.S. __, 118 S. Ct. __, 141 L. Ed. 2d 201 (1998), a case of same-sex harassment, this Court set forth the analysis to be used in a Title VII claim of discrimination "because of . . . sex."

The critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. The corollary here is that members of one race should not be exposed to disadvantageous terms or conditions of employment to which members of the other

race are not exposed. This Court in *Oncale* stated that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex". This Court indicated that a trier of fact may reasonably find discrimination where the victim is harassed in such sex-specific and derogatory terms to make it clear that the harasser is motivated by general hostility to the presence of that sex in the workplace. This Court went on to indicate that direct comparative evidence may be offered as to how the alleged harasser treated members of both sexes in a mixed-sex workplace, but that whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely "tinged with offensive sexual connotations", but actually constituted discrimination because of sex. 140 L. Ed. 2d at 207-208.

The Court of Appeals here also questioned the applicability of 42 U.S.C. 1981, but § 1981 provides additional protection from discrimination based on race and it follows the same analytical model as Title VII. Whether or not evidence of conduct occurring prior to the 300 day period is admissible for section 1981 purposes, the petitioner was entitled to an evaluation of her claim based on evidence of conduct occurring six years from the date of filing of the complaint in federal court. Therefore, all evidence of Andersen's conduct from six years prior to the date of filing the complaint should be considered.

Andersen's conduct was abusive and clearly adversely affected a term or condition of petitioner's employment. The Court of Appeals failed to consider the general work atmosphere with its pervasive sexual and racial harassment because of its conclusion that because Andersen was not a workplace decision maker his comments made in the

workplace could not form the basis for a discrimination claim. This conclusion is in direct conflict with this Court's rulings in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*. Had the court considered the conduct of Andersen in making racial and sexual comments in the presence of a racially and sexually mixed work force, it would have easily come to the conclusion that the character and purpose of Andersen's conduct was sexual and racial.

What the Court of Appeals did was to hold that Andersen's conduct, although implicit, did not have the "tinge of any sexual connotations." But this is irrelevant since the issue is whether the conduct had a racial character or purpose. The non-verbal harassment conduct of slamming the door in her face, cutting her car off in the parking lot and startling her with an electric cart, clearly do not have racial or gender overtones. A jury could reasonably find that the non-verbal harassment conduct of Andersen had a racial purpose and was intended to achieve a racial objective.

The harassing conduct in *Faragher* occurred intermittently over a five-year period. The comparable conduct here occurred over a six-year period. The harassing conduct exhibited by Andersen need not be explicit to have a racial purpose. The scope of conduct prohibited by Title VII is not limited to economic or intangible discrimination. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). In *Burlington Industries, supra*, this Court reiterated that the principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms and conditions of employment and explained that the latter must be severe or pervasive. Andersen's conduct

amounted to the fulfillment of threats similar to those in *Burlington*, and the conduct was done solely because of the plaintiff's race and sex. This constitutes discrimination based on sex and race in violation of Title VII and § 1981. Accordingly, it is submitted that the petition should be granted.

CONCLUSION

Because the decision by the Seventh Circuit Court of Appeals conflicts with prior rulings of this Court and with decisions of other courts of appeal on important issues of sexual and racial harassment in the workplace, the petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED JANUARY 28, 1999

In the
United States Court of Appeals
For the Seventh Circuit

No. 98-2058

Katie R. Hardin,

Plaintiff-Appellant,

v.

S.C. Johnson & Son, Inc.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 95-C-0944 — Thomas J. Curran, Judge.

Argued December 9, 1998 — Decided January 28, 1999

Before Flaum, Easterbrook and Diane P. Wood, Circuit Judges.

Flaum, Circuit Judge. Before us is Katie R. Hardin's ("Hardin") appeal from the district court's grant of summary judgment to S.C. Johnson & Son, Inc., ("S.C. Johnson") on her Title VII sexual and racial harassment claims and her 42 U.S.C. sec. 1981 claim. The district court adopted the

recommendation of Magistrate Judge Goodstein, who found that although Ms. Hardin was mistreated by an obnoxious co-worker, her case could not survive the defendant's motion for summary judgment. For the reasons discussed below, we affirm the district court's decision.

FACTS

Katie Hardin was hired by S.C. Johnson at its Sturtevant, Wisconsin plant as an hourly worker in 1972. Starting in 1988, she changed production lines, and began working with and for Nels Anderson. By all accounts, Anderson was a crude and boorish person, prone to offensive language and behavior. In the time they worked together, Anderson often used expletives, directed at Hardin and other workers, and berated them with statements like "get your head out of your ass" or "dumb motherfucker." Hardin also alleges that on numerous occasions, Anderson touched her. Although she says the touching lasted between a few and thirty seconds, her complaint does not specify where or in what manner Anderson touched her. A year after transferring to Anderson's line, Hardin and her coworkers complained to a supervisor, who told Anderson his profanity was inappropriate for the workplace.

Anderson apparently did not get the message, and continued using foul language and behaving crudely. Hardin proffers the affidavit of Anderson's ex-girlfriend, who stated that between 1991 and 1994, Anderson routinely referred to Hardin and other black women as "stupid black bitches," "stupid niggers," and "black cunts," although Hardin does not assert Anderson made such statements to her. Hardin

does offer evidence that Anderson continued to curse at her and other factory employees. In 1993 and again in 1995, Hardin complained to management about Anderson's behavior. Each time the company met with her, and responded to her complaints by reiterating its warnings to Anderson about his inappropriate behavior. S.C. Johnson also told Anderson to avoid the plaintiff unless he absolutely had to speak to her.

In her 1995 complaint to the company, Hardin asserted that she was being treated poorly because she was a black woman. In addition to the cursing and touching, she complained that Anderson startled her by driving up behind her in an electric cart without warning, letting a door slam in her face, and cutting her off in the parking lot. An investigation by S.C. Johnson's human resources director found that no other African-American employees believed they were being discriminated against on the basis of race, although it turned up evidence that a number of white men on the line felt they were mistreated by Anderson.

Additional complaints in 1995, including one to the president of S.C. Johnson, William Perez, resulted in Anderson being transferred to another production line. On June 1, Hardin learned that Anderson was temporarily re-assigned to work on her line during the June 3 overtime shift. Hardin opted not to work that day, a decision for which she was not penalized. Two days later, S.C. Johnson promised that they would rarely be assigned to the same line again, but that if that came to pass, Hardin would be informed ahead of time, and would be given the option to demur from working with Anderson.

Appendix A

On June 13, 1995, Hardin filed a complaint with the Wisconsin Department of Industry, Labor and Human Relations' Equal Rights Division ("ERD"). She received a right to sue letter on September 8 of that year, and brought her cause of action. The magistrate judge ruled in favor of S.C. Johnson, and the district court approved of that decision. This appeal followed.

ANALYSIS

The district court's decision to grant summary judgment to the defendant is reviewed de novo. Chmiel v. J.C. Penney Life Ins. Co., 158 F.3d 966, 968 (7th Cir. 1998). It is appropriate only where the non-moving party fails to set forth specific facts showing that there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e); Senner v. Northcentral Technical College, 113 F.3d 750, 757 (7th Cir. 1997). Although we must draw all reasonable inferences in Hardin's favor, NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 234 (7th Cir. 1995), not every factual dispute creates a barrier to summary judgment. Only disputes that might affect the outcome of the suit under our precedent will properly preclude the entry of summary judgment. Derrico v. Bungee Intern. Mfg. Co., 989 F.2d 247, 250 (7th Cir. 1993).

With this standard in mind, we review the record to ascertain whether Hardin presented evidence giving rise to a triable claim. First, however, we must determine what of the evidence Hardin proffered we may use in reaching our ultimate conclusion.

Appendix A

I.

S.C. Johnson argues that Hardin is time-barred from relying on any evidence of harassment occurring prior to August 16, 1994 — 300 days before her complaint with the Wisconsin ERD. Under Title VII, a plaintiff has 300 days from the occurrence of an allegedly discriminatory act in which to file a timely charge either with the federal Equal Employment Opportunity Commission or the appropriate state agency — here the ERD. Generally, a plaintiff is only allowed to base a Title VII suit on conduct occurring within the limitations period. Galloway v. General Motors Service Parts Oper., 78 F.3d 1164, 1166 (7th Cir. 1996).

A particular exception to this is the "continuing violation doctrine" which this court has recognized on a multitude of occasions. Dasgupta v. University of Wisconsin Bd. of Regents, 121 F.3d 1138, 1139 (7th Cir. 1997); Galloway, 78 F.3d at 1166 (collecting cases). This doctrine is designed to "accommodate plaintiffs who can show that there has been a pattern or policy of discrimination continuing from outside the limitations period into the statutory limitations period, so that all discriminatory acts committed as part of this pattern or policy can be considered . . . timely." Peatzold & O'Leary, Continuing Violations and Hostile Environment Sexual Harassment: When is Enough, Enough?, 31 Am. Bus. L.J. 365 (1994).

When it would be unreasonable to expect the plaintiff to perceive offensive conduct as Title VII harassment before the limitations period runs, or the earlier discrimination may

only be recognized as actionable in light of "events that occurred later, within the period of the statute of limitations" the continuing violation doctrine applies. Galloway, 78 F.3d at 1167. The doctrine also may be used when, after an initial incident of discrimination, a plaintiff does not feel "sufficient distress to . . . mak[e] a federal case." Id. at 1166.

On the other hand, the continuing violation doctrine has delineated limits. Where a pattern of harassment spreads out over years, and it is evident long before the plaintiff sues that she was a victim of actionable harassment, she "cannot reach back and base her suit on conduct that occurred outside the statute of limitations." Id. at 1167; Doe v. R.R. Donnelley & Sons., Co., 42 F.3d 439, 446 (7th Cir. 1994). While a single comment may not be harassment, if the comment is repeated over a period of years, its cumulative effect likely precludes invocation of the doctrine. See Galloway 78 F.3d at 1167.

It is clear from Ms. Hardin's evidence that the continuing violation doctrine is inapplicable here. The evidence advanced in support of the plaintiff's motion for summary judgment shows that Anderson began directing rude and offensive behavior — brief touching, coarse language and statements to the plaintiff that she should move off of Anderson's line — toward Hardin in 1988. Hardin testified that she felt harassed as early as 1988. She verbally complained to management in 1989, and filed a written complaint with S.C. Johnson's human resources department in 1993. It is apparent that Hardin believed that she was a victim of harassment long before she filed her complaint with the Wisconsin ERD; it follows that it would

not have been unreasonable for her to seek redress for this conduct by filing before June 1995. Accordingly, in her Title VII claims, she may not reach back and rely on evidence occurring prior to 300 days before she filed her complaint. Her racial and sexual harassment complaints must stand or fall on conduct occurring between August 16, 1994 and June 12, 1995, although her 42 U.S.C. sec. 1981 claim has a six year statute of limitations.

For purposes of the Title VII claim, this eliminates the most damaging evidence of harassment by Anderson. These alleged racist statements to Brannon about the plaintiff happened prior to the limitations period, and thus are irrelevant. There are other problems with those proffered statements — they were made outside of the workplace, and Ms. Hardin admittedly knew nothing of them. We note, however, that were such noxious statements relevant to the record we considered — if in fact Anderson spoke them in the workplace or to Hardin's face within the limitations period — the thrust of this opinion could be markedly different.

II.

Title VII's ban on gender discrimination is violated when "discrimination based on sex . . . creates a hostile or abusive work environment." Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986). To make a claim under Title VII, a plaintiff must show that her workplace was both objectively and subjectively hostile. Harris v. Forklift Systems, 510 U.S. 17, 21 (1993). There is no dispute that the plaintiff subjectively believed that her workplace was

hostile in this case. The plaintiff must also show that the harassment was objectively "sufficiently severe or pervasive as to alter the conditions of the victim's employment and to create an abusive working atmosphere." R.R. Donnelly & Sons, 42 F.3d at 443. This standard also applies to racial discrimination suits under Title VII. Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 673 (7th Cir. 1993). Whether such an environment exists is a question of law. Brooms v. Regal Tube Co., 881 F.2d 412, 420 (7th Cir. 1989). Because Hardin's racial and gender discrimination claims rely on the same evidence, we analyze them together.

In reviewing Hardin's claims, we underscore that Anderson's conduct need not have been explicitly sexual or racial in order to create a hostile environment as the magistrate judge's opinion might appear to indicate. The complained of conduct must have either a sexual or racial character or purpose to support a Title VII claim. Malhotra v. Cotter & Co., 885 F.2d 1305, 1308 (7th Cir. 1989) (emphasis added).

Against this backdrop, we examine Anderson's actions committed within the limitations period. They include: allowing a door to close in Hardin's face, startling her by approaching her from behind in an electric cart without warning, cutting her off in the parking lot, and his persistent cursing and use of abusive language. Obviously, we agree with the district court that it is unfortunate that Ms. Hardin was subjected to such behavior. Nevertheless, we cannot conclude that these actions constituted sexual or racial harassment.

Appendix A

Looking at Anderson's coarse language it is apparent that there was nothing inherently sexual or racial about his comments. Hardin alleges that Anderson said things to her such as "what the hell is going on?"; "what the hell are you doing?"; "get your head out of your ass"; "dumb motherfucker"; and "when the fuck are you going to get the product." These comments are much like ones in Galloway, which we viewed as in no way indicating that "women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect." 78 F.3d at 1168; See also Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997) (similar statements were held to be "simpl[e] expressions of animosity or juvenile provocation" rather than creating a hostile environment). Nor do these verbal outbursts implicate negative attitudes toward African-Americans. It cannot be said with any degree of certainty that the character of these remarks was discriminatory.

Moreover, the evidence demonstrates that Hardin was not singled out for abusive verbal treatment. Nothing indicates that Anderson's purpose in using disparaging language was to discriminate against women or black people. Hardin testified in her deposition that Anderson cursed at all employees on the line, white and black, male and female. This is supported by the depositions of nearly everyone who testified; it is undisputed that Anderson was a crude individual who treated all of his coworkers poorly. Thus, it would not be rational for a trier of fact to conclude that Anderson made the workplace less congenial for women or blacks than he did for men or whites. See Galloway, 78 F.3d at 1168.

Hardin also puts forward evidence of nonverbal harassment — the electric cart, door slamming and cutting off incidents — which were not directed at other employees. However, these events cannot be seen as having racial or gender overtones, and nothing suggests they were motivated by discrimination. Additionally, they were insufficiently severe to give rise to a hostile environment. As we recently noted, there is a "safe harbor for employers in which the alleged harassing conduct is too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex." Adusumilli v. City of Chicago, No. 98-1019, slip op. at 12 (7th Cir. December 28, 1998) (citation omitted). There, the court found no hostile environment where there was brief touching and poking by a coworker, as well as ambiguous comments directed at the plaintiff. Id. As the experienced magistrate judge here discussed in comprehensive detail, the facts of other cases, such as Baskerville v. Culligan Int'l Co., 50 F.3d 428 (7th Cir. 1995) and Saxton v. AT & T, 10 F.3d 526 (7th Cir. 1993) involved more intimidating and threatening actions, yet were not found to be sufficiently severe or pervasive to create a hostile working environment.

Because Hardin cannot establish that she was subjected to either gender or racial discrimination creating a hostile work environment, we need not go on to analyze whether S.C. Johnson's response to her complaints was negligent.

III.

The plaintiff's final claim is that the defendant's failure to remediate the situation between herself and Anderson

amounted to a violation of 42 U.S.C. sec. 1981. This Reconstruction-era statute, provides "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. sec. 1981(a). Although a 1989 Supreme Court ruling held that sec. 1981's protections only applied to contract formation, Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Civil Rights Act of 1991 mooted Patterson, amending sec. 1981 to prohibit racial harassment on the job, and other forms of discrimination occurring after the formation of a contract. Gonzalez v. Ingersoll Mill. Mach. Co., 133 F.3d 1025, 1033 (7th Cir. 1998). The plaintiff contends that she was subject to both disparate treatment and a hostile work environment in violation of her contract with the defendant under the statute.

Hardin's disparate treatment claim is that the company would not have allowed a white person to be abused by Anderson in the same fashion she was. She asserts that the defendant's "racially motivated failure to respond adequately to the plaintiff's complaint" violated sec. 1981. Of course, she may not rely on her own subjective and unsubstantiated assertions to prove her case. Fairchild v. Forma Scientific, 147 F.3d 567, 574 (7th Cir. 1998). Instead, she must present evidence that the defendant failed to respond to her complaints, and that the failure was racially motivated. See Gonzalez, 133 F.3d at 1035. Hardin may offer either direct or indirect evidence to show racial discrimination. Id.; see also Eiland v. Trinity Hospital, 150 F.3d 747, 750 (7th Cir. 1998). She shows neither.

The only direct evidence of racism in the corpus of evidence before us is Anderson's alleged string of odious

statements to his then-girlfriend Brannon.[1] Although these statements are not time-barred for sec. 1981 purposes, we still have doubts about their possible admissibility because the proffered comments were not made in the workplace, and Hardin never heard them. However, even if we considered such statements, she would fare no better because Anderson was not a workplace decision maker. Thus, his purported statements cannot provide the basis for a determination of discrimination. Eiland, 150 F.3d at 750 (non-decision maker's racial animus not imputed to company without showing a sufficient nexus). Turning back to the facts before us, Hardin points to no direct evidence suggesting that the defendant acted upon racially discriminatory motives.

Neither can the plaintiff point to a similarly situated white employee who was treated more favorably by the defendant. See Gonzalez, 133 F.3d at 1035. The facts are undisputed that blacks and whites were treated with equal disrespect by Anderson. Anderson apparently behaved toward everyone in the same manner — he swore at them, ridiculed them and threw objects at or around them. Hardin's claim that S.C. Johnson responded more quickly to the needs of white employees is belied by the fact that she was accompanied by a white co-worker in at least one of her complaints to management, which ultimately led to Anderson being told to "tone it down." She fails to point to anything showing either that white coworkers' complaints

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1. Hardin does not specifically point to this evidence in the sec. 1981 context; nevertheless we do not wish to let the allegation of such statements remain unaddressed.

about Anderson were responded to with more alacrity, or their complaints about any similar incidents were treated more solicitously by the company. Because Hardin cannot make showings of discrimination — either through direct or indirect evidence — her disparate treatment claim fails.

We need not consider Hardin's hostile work environment claim under sec. 1981. In a submission to the district court, the plaintiff did not raise this argument, and may have even expressly disavowed such a claim. Because of this, the claim is waived, and we need not address its merits.[2] See Oates v. Discovery Zone, 116 F.3d 1161, 1168 (7th Cir. 1997) ("it is axiomatic that arguments not raised below are waived on appeal.").

IV.

For the reasons we have discussed, Katie Hardin is unable to show that a genuine issue of material fact exists on either her Title VII or 42 U.S.C. sec. 1981 claim. Accordingly, the district court's entry of summary judgment in favor of the defendant, S.C. Johnson, is Affirmed.

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2. Even if we examined the merits of the hostile environment claim, the plaintiff's argument would fail. In analyzing sec. 1981 claims, we apply the same standards as in Title VII cases. Johnson v. City of Fort Wayne, 91 F.3d 922, 940 (7th Cir. 1996). As we found above, Ms. Hardin has no underlying claim that a hostile environment existed under Title VII based on the evidence presented. Thus, the company cannot be held liable sec. 1981.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN DATED AND FILED APRIL 1, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 95-C-944

KATIE R. HARDIN,

Plaintiff,

v.

S.C. JOHNSON & SON, INC.,

Defendant.

OPINION AND ORDER

The Plaintiff in this action, Katie R. Hardin, has been employed by the Defendant S.C. Johnson & Son, Inc. as an hourly production worker since 1972. In 1988, Hardin was transferred to line 374, a production line in the aerosol production area, at which time she claims she was subjected to sexual and racial harassment by Supervisor Ron Klimowicz and Line Chief Nels Andersen, in violation of Title VII and 42 U.S.C. § 1981. On March 9, 1998, United States Magistrate Judge Aaron E. Goodstein recommended that this court grant the Defendant's motion for summary judgment. The Plaintiff has filed a number of objections to the magistrate judge's recommendation. The court's review is *de novo*.

Appendix B

The Plaintiff first maintains that the magistrate judge erred in concluding that acts of harassment which did not occur within the limitation period are not actionable under Title VII. She has offered ample authority for the proposition that evidence of discriminatory conduct by an employer prior to the relevant limitation period may be admissible and relevant evidence of discriminatory intent as to conduct occurring within the limitation period. The magistrate judge, however, did not err in this respect but rather considered both the acts which the Plaintiff maintained constituted sexual or racial harassment within the limitation period and before the limitation period.

The Plaintiff also objects to the finding by the magistrate judge that the off-premises remarks made by Andersen about the Plaintiff lacked a sufficient nexus for the Plaintiff to establish a hostile work environment. The ultimate question is whether a triable issue of fact exists as to whether the Plaintiff, as a black woman, was "exposed to disadvantageous terms or conditions of employment to which members of the other [race or sex were] not exposed." *Oncale v. Sundowner Offshore Services, Inc.*, 18 S. Ct. 998, 1002 (1998) *quoting Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993). The magistrate judge was correct in discounting the off-job comments made by Andersen. The court further rejects the Plaintiff's objection that the magistrate judge failed to consider whether management acted reasonably in response to Hardin's complaint because there was insufficient evidence that the Plaintiff was in fact subjected to racial or sexual harassment. The court, however, has reviewed the record and finds that management did act reasonably in addressing Hardin's

complaints, even though it may not have been the result that Hardin would have preferred.

Finally, the Plaintiff objects to the magistrate judge's conclusion that the employer's "mission statement" did not constitute a contract. As the magistrate judge noted, however, it is irrelevant whether the parties intended to be bound by the mission statement because both black and white employees were treated equally, albeit reprehensibly, by Andersen. The court accordingly adopts the recommendation of the magistrate judge in its entirety and ORDERS that the Defendant's motion for summary judgment IS GRANTED.

IT IS FURTHER ORDERED that the Clerk of Court enter final judgment in favor of the Defendant and against the Plaintiff who takes nothing.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin, this 1st day of April, 1998.

s/ Thomas J. Curran
Thomas J. Curran
United States District Judge

APPENDIX C — RECOMMENDATION TO DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN DATED AND FILED MARCH 9, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 95-C-944

KATIE R. HARDIN,

Plaintiff,

v.

S.C. JOHNSON & SON, INC.,

Defendant.

RECOMMENDATION TO DISTRICT JUDGE

On September 14, 1995, the plaintiff commenced this action in which she alleges that she was discriminated against in the terms and conditions of her employment because of her race and gender, contrary to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e)-(2)) and 42 U.S.C. § 1981. This case was randomly assigned to this court for all pretrial processing. Jurisdiction is proper based upon the existence of federal questions. *See* 28 U.S.C. § 1331. Venue is proper in the Eastern District of Wisconsin. Because the parties did not consent to full magistrate judge jurisdiction, this court's jurisdiction is limited to issuing a recommendation with respect to the defendant's motion for

summary judgment, which is currently pending before this court.

I. BACKGROUND

The following constitutes a summary of the facts which are undisputed for purposes of the defendant's motion for summary judgment. *See* Local Rule 6.05. More detailed facts will be referred to as they arise during analysis of the defendant's motion. The plaintiff is a black female who resides in Wisconsin. (Complaint at ¶¶ 4, 8). Defendant S.C. Johnson & Son is a Wisconsin corporation with its principal place of business in Racine, Wisconsin. (James Fredrick Aff. at ¶ 2). The plaintiff has been employed by S.C. Johnson since 1972 as an hourly production worker. (Katie Hardin Dep. at pp. 10-12). In 1988, Ms. Hardin was transferred to line 374, an assembly line devoted to producing aerosol. (Hardin Dep. at pp. 12-13). Nels Anderson was the line chief for line 374 from the date the plaintiff transferred to the line until June, 1993. (Hardin Dep. at ¶ 16).

From 1988 to 1993, the plaintiff alleges that Andersen used vulgar language, such as "hell," "ass", "fuck" and "shit" on a nearly weekly basis. (Hardin Dep. at p. 114). Often, Andersen's coarse vocabulary was directed at the plaintiff. For instance, Hardin alleges that Andersen said to her: "what the hell is going on?"; what the hell are you doing?"; "shit"; "get your head out of your ass;" "dumb motherfucker;" you're doing that fucking right;" and "fuck you." (Hardin Dep. at pp. 113-114).

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In 1989, Ms. Hardin, along with three other female workers, told their supervisor, Richard Konieczko, that Andersen treated the women on the line poorly, was disrespectful, cursed and threw objects while on the job. (Hardin Dep. at pp. 162-164). As a result, Konieczko monitored Andersen's actions and told him that there was no need for profanity in the workplace.

In 1993, Ms. Hardin alleges that a number of specific incidents occurred. She again complained about Andersen during an employee meeting, where she stated that Andersen cursed at the women on the line and was disrespectful. (Hardin Dep. at pp. 169-170). Ron Klimowicz, who replaced Konieczko as line supervisor, warned Andersen that such behavior was unacceptable and had to stop. (Hardin Dep. at p. 171). Later that week, Ms. Hardin told Klimowicz that Andersen was still swearing and that she told Andersen to stop touching her. Klimnowicz told Hardin that he would talk to Andersen and indicated that she should report any further incidents. (Hardin Dep. at pp. 172-173). Later in 1993, Klimowicz told Hardin and another female line worker that he should be made aware of any inappropriate behavior displayed by Andersen to make sure that all problems were documented. (Klimnowicz Dep. at pp. 31-32).

In March, 1993, the plaintiff spoke to Sherry Johnson, S.C. Johnson's human resource manager, and complained about Andersen's profane language, that he called her a liar, and that he did not want her on the line. (Johnson Dep. at p. 12). Hardin also told Johnson that men on the line were not treated with such disrespect. (Johnson Dep. at p. 22).

Johnson told Hardin that the company prohibited sexual harassment and explained that Hardin needed to do to file a written complaint. (Hardin Dep. at p. 181). Johnson also held a meeting with Klimowicz to discuss Andersen's behavior. On March 11, 1993, Johnson met with Andersen, where he admitted that he used foul language and that he suggested to Hardin that she move to another line. (Johnson Dep. at p. 52).

Also, in March, 1993, the plaintiff informed a supervisor that Andersen's wife worked on the same production line as Andersen, although S.C. Johnson's policy prohibits spouses from working on the same production line. (Hardin Dep. at pp. 115-116). After Andersen's wife was removed from the line, Andersen confronted Hardin about the matter but Hardin indicated that she did not know what Andersen was referring to. Andersen then called her a liar and asked, "What the hell do you think you are doing? All you do is cause trouble on the line." (Hardin Dep. at pp. 125-126). On another occasion, Andersen told the plaintiff, "I wish you would do us all a favor and go to another line." (Hardin Dep. at p. 116). Andersen also asked the plaintiff "where the hell" she was when he felt she took a long break, and "what the hell were you doing, don't you know how to do your job," when Andersen felt the plaintiff did not perform satisfactorily. (Hardin Dep. at pp. 116, 134-135).

Then in March, 1993, the plaintiff filed a written complaint with the Human Resources Department and complained that Johnson sexually harassed her. (Hardin Dep., Ex. 7). The complaint states that "the reason I am accusing Nels of sexually harassing me, is because he only

harasses the women and not the men, that work on the line." (*Id.*). Specifically, Hardin claimed that Andersen swore at her, that he wished she would move to another line, and that he accused her of being a liar. (*Id.*). The complaint was delivered to Steve Price, Ms. Johnson's supervisor, who subsequently warned Andersen that such conduct would not be tolerated. (Hardin Dep. at p. 183). At this time, Andersen's cursing stopped after Hardin's formal complaint was received by S.C. Johnson's management, who told Andersen to stop such behavior and to avoid the plaintiff unless he absolutely had to talk to her. (Hardin Dep. at p. 122).

The plaintiff's allegations of sexual harassment are not limited to Andersen's coarse vocabulary. Ms. Hardin also states that, beginning in 1988, Andersen sexually harassed when he frequently touched her on the neck, shoulders and, on one occasion, touched her feet. (Hardin Dep. at pp. 143-145).

In 1995, Ms. Hardin complained to James Fredrick, who became human resources director in 1995, that she perceived she was treated differently by Andersen because she is a black woman. (Fredrick Dep. at p. 8). Fredrick then interviewed other black employees to determine whether they had similar concerns. (Fredrick Dep. at pp. 13-14). Fredrick states that none of the black employees he spoke with expressed a belief that they were discriminated against. (Fredrick Dep. at p. 26).

In February, 1995, the plaintiff complained to William Perez, Johnson's president, that Andersen harassed her, that

she had filed a complaint, and that the company did not take action. (Hardin Dep. at p. 214). Perez spoke to Fredrick about Hardin's complaints and decided to move Andersen to another production line. (Fredrick Aff. at ¶ 16). However, on June 3, 1995, Andersen was assigned to work an overtime shift on line 374. Ms. Hardin chose not to come to work that day. (Hardin Dep. at p. 240). On June 5, 1995, the plaintiff complained to Jim Potochick, the plant manager, that Andersen was assigned to her line. (Hardin Dep. at pp. 241-242). Ms. Hardin also complained that Andersen startled her when he came from behind her in an electric cart without warning, that he let a door slam in front of her, and that he cut her off in the parking lot. (Hardin Dep. at pp. 246-247). Fredrick told Hardin that she would not be permanently assigned to work with Andersen, and that if in a rare circumstance Andersen was assigned to work with Hardin, she would be notified in advance and provided the option of not working with Andersen. (Fredrick Aff. at ¶ 18).

On June 13, 1995, the plaintiff filed a complaint with the Wisconsin Department of Industry, Labor and Human Relations' Equal Rights Division [hereinafter "ERD"]. Ms. Hardin complained that she had experienced racial and sexual discrimination since 1993. (Plaintiff's Ex. S at p.1). On September 8, 1995, the plaintiff received a notice of right to sue letter from the ERD.

II. ANALYSIS

The defendant moves for summary judgment under Fed. R. Civ. P. 56. S.C. Johnson argues that the undisputed facts

show that: 1) it is entitled to summary judgment on Andersen's Title VII claims because the alleged misconduct was not sexual or racial in nature and because Andersen's alleged misconduct is not sufficiently severe or pervasive to constitute an actionable hostile work environment; 2) even if Andersen's acts presented a hostile work environment for Hardin based or her race and gender, S.C. Johnson is not liable because it reasonably responded to the plaintiff's complaints; and 3) it is entitled to summary judgment on Hardin's § 1981 claim because Andersen's actions were not racially motivated and Hardin was not subjected to treatment that was not imposed upon white employees. The defendant contends that summary judgment is inappropriate because women, specifically black women, were singled out by Andersen for abuse and S.C. Johnson did not take adequate measures to discipline Andersen or to prevent his conduct from recurring.

A motion for summary judgment will be granted when there are no genuine issues as to material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). As provided under Rule 56(c), only "genuine" issues of "material" fact will defeat an otherwise "proper" motion for summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "[M]aterial" facts are those facts which, under the governing substantive law, "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over such material facts is "genuine" if the evidence is such that a reasonable trier of fact could find in favor of the nonmoving party. *Anderson*, 477 U.S. at 248.

The movant bears the burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Rule 56(c); *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970); *see also Celotex Corp. v. Catrett*, 477 U.S. at 323 (the moving party has the responsibility of informing the court of portions of the record or affidavits that demonstrate the absence of a triable issue). In addition, the moving party may meet its burden to show an absence of a material issue by demonstrating "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255; *Cain v. Lane*, 857 F.2d 1139, 1142 (7th Cir. 1988); *Spring v. Sheboygan Area School Dist.*, 865 F.2d 883, 886 (7th Cir. 1989). If the moving party meets its burden, the nonmoving party then has the burden to present specific facts showing that there is a genuine issue of material fact. *Matsushita Elec. Inus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

1. Title VII Claims

A. Statute of Limitations

Before discussing the merits of the plaintiff's allegations of discrimination, the court must determine whether Hardin may allege facts in support of her claims which occurred more than 300 days before she filed her complaint with the ERD. The defendant avers that the statute of limitations for Title VII actions prevents Hardin from alleging facts which occurred before August 16, 1994. The

plaintiff contends that because she alleges Andersen's behavior was continuous from 1988 to 1995, any act which occurred after 1995 may be raised to support her Title VII claims.

The statute of limitations for filing a discrimination charge under Title VII with the federal Equal Employment Opportunity Commission or appropriate state agency is 300 days from the date of the allegedly discriminatory act. 42 U.S.C. § 2000e-5(e). However, equitable principles of limitations law, such the discovery doctrine, equitable estoppel and equitable tolling, "excuse the claimant from having to file before it is feasible to do so, and these principles apply to cases brought under Title VII." *Galloway v. General Motors Service Parts Oper.*, 78 F.3d 1164, 1166 (7th Cir. 1996). If a Title VII claimant "sues as soon as the harassment becomes sufficiently palpable that a reasonable person would realize she had a substantial claim under Title VII," then she may "allege as unlawful conduct the entire course of conduct that in its cumulative effect has made her working conditions unbearable." *Id.* However, the plaintiff may not base her case on conduct that occurred outside the limitations period unless it is "unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." *Id.* at 1167.

The plaintiff claims that Andersen began directing rude and offensive behavior toward her in 1988. Such conduct included coarse language, accusations of lying, touching,

and statements that the plaintiff should transfer to another line. Hardin argues that because Andersen committed such acts within and outside the limitations period, a continuing violation is established for which she should be allowed to present evidence from the violation's origin.

However, "a plaintiff who has been the victim of a long chain of events cannot introduce the whole chain if at any point along the line she would have been aware of her injury but failed to file." *Alvey v. Rayovac Corp.*, 922 F.Supp. 1315, 1326-27 (W.D. Wis. 1996) (citing *Galloway*, 78 F.3d at 1166-67). Under such circumstances, the plaintiff may only sue for acts of harassment which occurred within the limitations period. *Id.* at 1327.

During her deposition, Hardin testified that she believed Andersen began harassing her because of her sex and race in 1988. (Hardin Dep. at p. 65). In 1993, the plaintiff filed a complaint with S.C. Johnson's human resources department alleging that she was sexually harassed by Andersen. Assuming that Andersen's conduct constitutes a chain of related events which amount to sexual and racial harassment, Hardin perceived such conduct as harassment during 1993, and more than likely as early as 1988. Thus, because Hardin believed during the chain of events that Andersen harassed her, any acts of harassment which did not occur within the limitations period are not actionable under Title VII. As the plaintiff filed her complaint with the ERD on June 12, 1995, only acts which occurred after August 16, 1994 are actionable under Title VII. However, because Wisconsin's six-year statute of limitations for injuries to character and rights, § 893.53, Wis. Stats., applies

to § 1981 actions, the plaintiff may sue for any acts which occurred after June 12, 1989 under her § 1981 claim. *See Saldivar v. Cadena*, 622 F.Supp. 949, 956 (W.D. Wis. 1985).

B. Hostile Environment Sexual Harassment

The defendant moves for summary judgment with respect to Hardin's hostile environment sexual harassment claim, arguing that the acts for which the plaintiff complains did not create a hostile environment as a matter of law. The plaintiff, on the other hand, contends that because Andersen verbally abused women more than men, a hostile environment was created.

Title VII's prohibition against discrimination based on sex includes claims of sexual harassment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986). Sexual harassment may take two forms — quid pro quo or hostile work environment. *Id.* Hardin only alleges hostile work environment.

The existence of a hostile work environment is a question of law. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 420 (7th Cir. 1989). For harassment to be actionable as creating a hostile work environment, it must be "sufficiently severe or pervasive as to alter the conditions of the victim's employment and to create an abusive working atmosphere." *Doe v. R.R. Donnely & Sons Co.*, 42 F.3d 439, 443 (7th Cir. 1994). Whether an environment is hostile depends on the totality of the circumstances, such as the frequency of the discriminatory conduct, its severity, whether it is

physically threatening or humiliating — or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). These factors are evaluated from a subjective and objective viewpoint — the effect the conduct actually had on the plaintiff and the impact the conduct would likely have on a reasonable employee in similar circumstances. *Saxton v. AT&T Co.*, 10 F.3d 526, 534 (7th Cir. 1993). To be actionable under Title VII, the conduct must create an environment that a reasonable person would find hostile or abusive *and* the victim must subjectively perceive the environment to be abusive. *Harris*, 510 U.S. at 21-22. Proceeding under this dual test, and for the purpose of summary judgment, the court will accept that Hardin subjectively perceived the environment at S.C. Johnson to be hostile and abusive. However, the court must also be satisfied that the environment was objectively hostile and abusive in order to allow Hardin's claim to proceed past the summary judgment stage.

Based on the allegations submitted to the court, Mr. Andersen engaged in reprehensible conduct — one does not have to be a prude to find offensive the language to which he subjected the plaintiff. There is no excuse for using such vulgar and demeaning language with co-employees, but the present motion does not test Anderson's conduct from a standpoint of civility; it tests such behavior against the legal standard established for sexual harassment. An analysis of the alleged facts discloses that Mr. Andersen is not a sexual harasser, because the evidence does not indicate that the actions he took against Ms. Hardin were based on her gender. In other words, the undisputed facts do not show

that, but for the fact that the plaintiff is a woman, she would not have been subjected to Andersen's crude comments and threatening actions. Rather, Andersen's comments were gender-neutral insults, which are not actionable as sexual harassment.

The acts Andersen committed within the limitations period include allowing a door to the plant to close in the plaintiff's face, startling the plaintiff by approaching her from behind without warning in an electric cart, and cutting her car off in the company parking lot with his car. While Andersen confirms Edmund Burke's fear, albeit some 200 years later, that the age of chivalry is gone, such acts do not constitute sexual harassment because they are not gender-based offenses. *See* Edmund Burke, *Reflections on the Revolution in France* 115 (1790) ("The age of chivalry is gone. — That of sophisters, economists, and calculators, has succeeded; and the glory of Europe is gone.")

Even when conduct which allegedly occurred outside the limitations period is considered, Hardin fails to present a claim for hostile environment sexual harassment. Starting in 1988, Hardin alleges that Andersen threw tools and subjected her to the following profane language: "what the hell is going on?"; "what the hell are you doing?"; "shit;" "get your head out of your ass;" "dumb motherfucker;" "when the fuck are you going to get the product?" "you're doing that fucking right;" and "fuck you." Again, while Andersen is certainly not a choir boy, such evidence does not indicate that he is a sexual harasser because the coarse language was gender-neutral. *See Vandeventer v. Wabash National Corp.*, 887 F. Supp. 1178, 1181 n.2 (N.D. Ind.

1995) (plaintiff did not present prima facie case for sexual harassment where he was subjected to epithets with sexual component, but the epithets were not directed at him because of his gender).

In this respect, *Galloway v. General Motors Service Parts Oper.*, 78 F.3d 1164 (7th Cir. 1996), is instructive, where the Seventh Circuit held that the repeated use of the term "sick bitch" did not constitute sexual harassment. The *Galloway* plaintiff alleged that a coworker continuously referred to her as a "sick bitch" for four years, in reference to the plaintiff's psychiatric disorder. *Galloway*, 78 F.3d at 1165. On one occasion, the coworker also made an obscene gesture to the plaintiff and told her to "suck this, bitch." *Id.* While the court noted that heterosexual males are rarely referred to as "bitches," it observed that the word does "not necessarily connote some specific female characteristic . . . it does not draw attention to the woman's sexual or maternal characteristics or to other respects in which women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect." *Id.* at 1168. Similarly, Andersen's acts, while insulting, were unrelated to the plaintiff's gender.

Hardin argues that the cumulative impact of Andersen's conduct, coupled with its differential impact upon women, created a hostile working environment. However, Hardin testified that Andersen cursed at everybody who worked on his line, including men. (Hardin Dep. at pp. 30-31, 118-119). Because the undisputed facts show that Andersen was equally disrespectful to men and women, the plaintiff cannot show that Andersen verbally abused her because she

is a woman, a condition precedent for establishing a prima facie case of sexual harassment. *See Galloway*, 78 F.3d at 1168 (not rational for trier of fact to conclude that male worker made workplace less congenial for women than for men if worker refers to a woman as a "dumb bitch" and to a man as a "dumb bastard").

Citing *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), *cert.denied*, 513 U.S. 1082 (1995), the plaintiff argues that the court must consider what is offensive and hostile to a reasonable woman, regardless of whether Andersen treated male and female employees alike. In *Steiner*, the plaintiff appealed the district court's grant of summary judgment for the defendant where the facts established that the plaintiff's supervisor was abusive to men and women alike, but his abusive treatment and remarks toward women were of a sexual and gender-specific nature (the supervisor referred to her as a "dumb fucking broad," "cunt" and "fucking cunt" and told a co-female employee that he would "hate to terminate someone with big boobs." *Id.* at 1461-1462. The Ninth Circuit held that the district court erred when it accepted the defendant's argument that the plaintiff's supervisor was equally abusive to men and women: "The numerous depositions of employees reveal that [the supervisor] was indeed abusive to men, but that his abuse of women was different. It relied on sexual epithets, offensive, explicit references to women's bodies and sexual conduct." *Id.* at 1463. The court then noted that even if the supervisor used sexual epithets against males, a court must consider what is offensive and hostile to a reasonable woman. *Id.* at 1464.

Appendix C

This court does not dispute that it must consider what a reasonable woman would find hostile and abusive. Certainly, the Supreme Court's mandate that courts consider the subjective and objective elements of a sexual harassment claim requires such an analysis. However, to be actionable as sexual harassment, the conduct to which the court evaluates the reasonable woman's response must be based on her gender. Abusive conduct which is unrelated to the victim's gender is not actionable, and that distinguishes the instant case from *Steiner*. Terms such as "shit," "hell," and even "motherfucker" are not gender specific, unlike "broad" and "cunt." As the Seventh Circuit recently held in *Johnson v. Hondo, Inc.*, No. 96-3492 (7th Cir. Aug. 28, 1997), certain expressions which refer to sexual acts, such as "fuck me," "kiss my ass," and "suck my dick," usually have no connection with the sexual acts to which they refer. "Ordinarily, they are simply expressions of animosity juvenile provocation . . . ." *Id.*, slip op. at 8. Moreover, unlike in *Steiner*, there is no evidence that Andersen's comments were sexual in nature. In *Steiner*, the defense argued that the supervisor was equally abusive to men and women failed because his abuse was clearly sexual in nature, unlike the abuse emanating from Andersen.

The plaintiff cites the case of *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D. Fla. 1991), to argue that it is irrelevant if Andersen's conduct lacked sexually explicit content as long as such conduct is disproportionately directed at women. Of course, behavior need not be sexual in nature to constitute sexual harassment. Rather, as held in *Robinson*, the plaintiff need only establish that but for her sex, she would not have been the object of harassment.

Id. at 1522. Thus, the harassment need not be sexual per se, such as offers to engage in sexual conduct; however, the harassment must be related to the employee's gender, such as referring to an employee as a "dumb broad," which the plaintiff fails to demonstrate.

Hardin also alleges that Andersen frequently touched her on the neck and shoulders between 1988 and 1993. Of course, Hardin may not raise such acts as a basis for her sexual harassment claim because they occurred outside the limitations period. However, even if such acts occurred within the limitations period, they were not sufficiently severe or pervasive so as to alter the conditions of Hardin's working environment and create an abusive working atmosphere.

In its recent cases, the Seventh Circuit has set the bar for conduct to qualify as sexual harassment much higher than what is alleged in this case. For example, regarding physical acts, the conduct must be far more egregious than touching the shoulder and neck for it to constitute sexual harassment. In *Baskerville v. Culligan International Co.*, 50 F.3d 428, 430 (7th Cir. 1995), the plaintiff complained that her boss, over a period of seven months, called her "pretty girl," made a grunting sound when she wore a leather skirt, told the plaintiff that her presence made the room hot, told the plaintiff that "all pretty girls run around naked" when employees are called to attention on the company loudspeaker, and made a hand motion to the plaintiff to suggest masturbation. However, the court held that no actionable hostile environment was created because the incidents were isolated and infrequent, the boss did not

touch the plaintiff, he did not invite her to have sex with him or go on a date with him, he did not expose himself, and he did not show her dirty pictures. *Id.* at 431. The court acknowledged a line, albeit difficult to draw, between actionable sexual harassment — sexual assaults, other uninvited amorous or hostile physical contact, uninvited sexual solicitations, intimidating words and acts, obscene language or gestures, and pornographic pictures; and nonactionable behavior — "the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers." *See id.* at 430. In the instant case, Andersen — the alleged harasser — did not threaten Hardin, did not expose himself to Hardin, and did not invite Hardin on a date or suggest they have sexual relations. Even if Andersen frequently touched Hardin on the shoulders and neck, there is no evidence that Andersen touched her with amorous intent. Although Andersen used vulgar language toward Hardin, his language was not infused with sexual innuendo.

In *Saxton v. AT&T*, 10 F.3d 526 (7th Cir. 1993), the plaintiff's supervisor placed his hand on the plaintiff's leg and rubbed his hand along her upper thigh after work at a nightclub. The plaintiff removed his hand, told him to stop, and told him that he could get in trouble for such conduct. When they left the nightclub, the supervisor pulled the plaintiff into a doorway and kissed her until she pushed him away. The plaintiff told her supervisor to not approach her again and he apologized. Three weeks later, the supervisor invited the plaintiff to lunch, drove to an arboretum, got out of the car to take a walk and " 'lurched at her from behind some bushes as if to grab her. *Id.* at 528. The appeals court affirmed the district court's grant of

summary judgment, holding that "[a]lthough [the supervisor's] conduct was undoubtedly inappropriate, it was not so severe or pervasive as to create an objectively hostile work environment." *Id.* at 534. The court focused on the fact that the incidents were isolated and the supervisor stopped the activity after being rejected twice by the plaintiff. *See id.* In the instant case, although the plaintiff alleges that Andersen touched her frequently, he stopped touching her after she complained about such conduct. And, again, the touching which did occur was far more innocuous than the activity which did not rise to the level of actionable sexual harassment in *Saxton*.

Finally, in *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333 (7th Cir. 1993), the plaintiff alleged that over a five-month period her supervisor asked her for dates, called her a "dumb blonde," put his hand on her shoulder several times, placed "I love you" signs in her work area, and attempted to kiss her twice at work and once in a bar. The appeals court upheld the district court's grant of summary judgment, noting that the incidents were relatively isolated and were not sufficiently serious to constitute sexual harassment. By contrast, the acts alleged in the instant case were not even implicitly sexual in nature, unlike the acts alleged in *Weiss* which still did not establish actionable sexual harassment.

To conclude, because the plaintiff fails to establish that she was subjected to an objectively hostile environment, the court will recommend that the defendant's motion for summary judgment on the plaintiff's hostile environment sexual harassment claim be granted.

Appendix C

C. Hostile Environment Racial Harassment

The defendant also moves for summary judgment with respect to Hardin's Title VII claim for hostile environment racial harassment, contending that Andersen's conduct was not racially motivated, the conduct was not sufficiently pervasive and severe, and the defendant acted reasonably in response to her complaints. The plaintiff, while focusing her response with regard to racial discrimination on her § 1981 claim, appears to argue that summary judgment is inappropriate because Hardin was singled out for disrespectful treatment by Andersen.

"Title VII . . . prohibits an employer from engaging in racial harassment that creates a hostile or offensive working environment." *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 673 (7th Cir. 1993). " 'The question in each case is whether the quantity and frequency of the [racial and ethnic slurs] are sufficient to state a violation of Title VII.' " *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1270 (7th Cir. 1991) (quoting *Nazaire v. Trans World Airlines, Inc.*, 807 F.2d 1372, 1380-81 (7th Cir. 1986)). As with alleged hostile environment based on sexual harassment, a hostile environment based on racial harassment is also to be evaluated from a subjective and objective perspective, requiring a court to consider both the "likely effect" of the conduct on a "reasonable" person and the "actual" effect upon the person bringing the claim. *Rodgers*, 12 F.3d at 674. As with plaintiff's sexual harassment claim, the court will assume that Hardin subjectively perceived that a hostile environment was created based on her race, although based upon the facts presented, this is a more difficult leap to

make than with the sexual harassment claim. Turning to an analysis of the objective prong of a racial harassment claim, the court may consider the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers and supervisors, totality of the work area's physical environment, " 'the lexicon of obscenity that pervaded the environment of the workplace,' " and the reasonable expectation of the plaintiff upon voluntarily entering that environment. *Daniels*, 937 F.2d at 1274 (quoting *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989)).

The plaintiff raises the same allegations in support of her racial harassment claim as were used to support her sexual harassment claim. Thus, the only acts which occurred within the limitations period are when Andersen cut the plaintiff off in a parking lot, when Andersen startled the plaintiff with an electric cart, and when Andersen shut a door in the plaintiff's face. However, no evidence exists that such acts were taken because of the plaintiff's race. For instance, the acts were not accompanied by a racial slur and no evidence exists that Andersen singled out the plaintiff for such treatment based on her race. In fact, Hardin testified that she never heard Andersen utter a racial epithet. (Hardin Dep. at p. 161).

Again, when acts are considered that occurred outside the limitations period, such as the profane language Andersen directed at the plaintiff, the plaintiff still fails to present a claim for hostile environment racial harassment because such remarks were not racially derogatory. Terms such as "shit," "hell," and "motherfucker" are race-neutral

and Title VII does not protect employees, regardless of their race, from race-neutral insults. As held by the Seventh Circuit, "not every act of harassment of a person who happens to belong to a racial minority or other protected group violates the statute. A member of such a group has no right to have a more congenial working environment than a white male, and therefore he can complain only about harassment that is discriminatory in character or purpose." *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989). Moreover, the plaintiff testified that Andersen directed profanity at both black and white employees. (Hardin Dep. at p. 32).

Hardin offers an affidavit from Rose Brannon, Andersen's girlfriend from 1993 to 1994, who states that she routinely heard Andersen refer to the plaintiff as a "stupid black bitch," "stupid nigger bitch," "fucking black bitch," and a "black cunt." (Brannon Aff. at ¶¶ 25, 34). However, Brannon indicates that such statements were made off the work premises. Such off-premise remarks that Andersen made to Brannon lack sufficient nexus for plaintiff to establish a hostile work environment. *See Daniels*, 937 F.2d at 1270 (Title VII guarantees employees the right to *work* in an environment free from discriminatory intimidation, ridicule and insult). To conclude, because Hardin fails to present any evidence that she was subject to racial harassment in the workplace, the court will recommend that the defendant's motion for summary judgment regarding plaintiff's Title VII racial harassment claim should be dismissed.

In view of the fact that Hardin has not established that a hostile environment based on racial or sexual harassment

was created, it is not necessary to address the defendant's contention that management acted reasonably in response to Hardin's complaints.

2. Section 1981 Claim

Lastly, the defendant moves for summary judgment regarding the plaintiff's § 1981 claim for racial discrimination. As with Hardin's Title VII claim, the defendant argues that it is entitled to summary judgment because any harassment Hardin endured was not racially based or motivated.

Section 1981 provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). "[T]he term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). To establish a claim under § 1981, the plaintiff must show: 1) that she is a member of a racial minority; 2) that the defendant intended to discriminate on the basis of her race; and 3) that the discrimination concerned an activity enumerated in the statute; in this case, the enjoyment of all terms, conditions and privileges of the contractual relationship. *See Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir. 1996).

Hardin states that, unlike her Title VII claim which was based on racial harassment, her § 1981 race discrimination claim is based upon her allegation that the defendant

breached its promise to the plaintiff, as stated in its mission statement, that she would be free from threats, intimidation, profanity and rude insults in the workplace; while similarly situated white employees enjoyed a working environment free from disrespect. Thus, the plaintiff contends that she did not enjoy the same fruits, privileges and benefits as whites in the workplace.

Whether the plaintiff may assert a § 1981 claim based on the terms of S.C. Johnson's mission statement depends upon whether the mission statement is contractually binding between the plaintiff and defendant. This is a question of state law. *See Border v. City of Crystal Lake*, 75 F.3d 270, 273 (7th Cir. 1996) (whether an employee handbook creates a contractual property right is a question of state law). Wisconsin law recognizes that the terms of an employee handbook, and presumably an employer's mission statement which is communicated to employees, can create an enforceable express contract or implied contract. *Garvey v. Butler*, 146 Wis.2d 281, 289, 430 N.W.2d 616, 619 (Ct. App.), *rev. denied*, 147 Wis.2d 889, 436 N.W.2d 30 (1988); *Ferraro v. Koelsch*, 124 Wis.2d 154, 164, 368 N.W.2d 666, 671 (1985). However, the mere existence of an employee handbook does not automatically render its terms contractual. *Ferraro*, 124 Wis.2d at 169, 368 N.W.2d at 674. Both implied and express contracts require a mutual meeting of the minds and an intent to contract, which is a question of fact. *Garvey*, 146 Wis.2d at 287, 289, 430 N.W.2d at 619.

No evidence is offered to show whether the parties intended the mission statement to have contractual

implications. The plaintiff does not indicate whether she perceived the mission statement as a contract, and the defendant does not state whether it intended the mission statement to constitute a contract. However, even if the mission statement is contractual, summary judgment is appropriate because the facts are undisputed that blacks and whites were treated with equal disrespect by Andersen. As noted above, Andersen treated white employees with the same disrespect as he treated Hardin — he swore at them, ridiculed them and threw objects in their presence.

Hardin states that she and Leevora Perry, another black employee, complained "vigorously" to S.C. Johnson management about how she was treated on the assembly line but to no avail. However, Hardin neglects to mention that Marsha Russell, who is white, and Marian Barootian, who is Hispanic, also accompanied Hardin and Perry to complain about their treatment. (Hardin Dep. at pp. 163-164). Thus, Hardin does not present evidence to show that white workers received preferential treatment when they complained to management about Andersen's behavior.

Hardin also alleges that a white worker, Janice Barker, received a more immediate response to her complaint regarding coarse language. Barker complained to James Potochick that she heard another employee speak vulgarity over a company radio. (Potochick Aff. at p. 70). Potochick states that he then reminded the line 366 employees at a team meeting that they should not curse given that statements may be heard over the company radio. By contrast, Hardin alleges that Potochick did nothing when she complained about Andersen's language. However, the

undisputed evidence shows that Hardin did not complain to Potochick about Andersen's behavior. Moreover, the behavior that Barker complained about was factually distinct from the behavior that Andersen directed toward Hardin; Andersen's comments were made in relative privacy compared to the comments Barker heard on the company radio.

The plaintiff offers a litany of alleged discriminatory acts which occurred to other black employees at S.C. Johnson — she states that black workers were denied equal training and pay, that black workers were prevented from competing for promotions, and that blacks were discriminated against in overtime. Such other discriminatory acts are not part of plaintiff's complaint, and are now the subject matter of another lawsuit plaintiff and a number of her co-workers have brought against the defendant. Accordingly, evidence of discrimination which was directed at other employees cannot be used to support the plaintiff's § 1981 claim for discrimination. *See Sample v. Aldi, Inc.*, 61 F.3d 544, 551 (7th Cir. 1995) (plaintiff must show link between alleged discrimination against coworkers with employment actions the plaintiff is challenging).

In her brief in opposition to summary judgment, the plaintiff also alleges that she was discriminated against in overtime assignments. However, upon reviewing the plaintiff's deposition, her complaint regarding overtime assignments was based on the fact that Andersen's wife worked on the line when Hardin was working overtime. Thus, the plaintiff's complaint regarding overtime is more akin to an allegation of nepotism than to an allegation of racial discrimination.

To conclude, even if the defendant's mission statement created a contractual right to work in an environment free from threats, intimidation and profanity; because Andersen's actions toward Hardin were not racially motivated and because whites were similarly mistreated by Andersen, the plaintiff does not establish that the defendant failed to realize its mission statement with respect to Hardin because she is black. The plaintiff fails to present a prima facie case for race discrimination under § 1981, and the court will recommend that the defendant's motion for summary judgment on that claim.

IT IS THEREFORE RECOMMENDED that the defendant's motion for summary judgment be **granted**.

The Clerk of Court is directed to reassign this case to a district judge in order to consider this recommendation and any objections thereto, and to schedule this case for any further proceedings, all discovery having been completed.

Pursuant to Local Rule 13.03(c), any objection to this recommendation must be filed in writing with the Clerk of Court in duplicate within ten days from the date this recommendation is received. Failure to file an objection within the specified time waives the right to appeal the district court's order on all factual and legal issues.

Dated at Milwaukee, Wisconsin, this 9th day of March, 1998.

s/ Aaron E. Goodstein
AARON E. GOODSTEIN
U.S. MAGISTRATE JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED MARCH 15, 1999

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

March 15, 1999

HON. JOEL M. FLAUM, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. DIANE P. WOOD, Circuit Judge

No. 98-2058

KATIE R. HARDIN,

Plaintiff-Appellant,

v.

S.C. JOHNSON & SON, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin

No. 95 C 0944

Thomas J. Curran, Judge.

Appendix D

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled case on February 11, 1999, by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

Supreme Court, U.S.
FILED
AUG 13 1999
OFFICE OF THE CLERK

No. 99-121

In The

Supreme Court of the United States

KATIE R. HARDIN,

Petitioner,

v.

S.C. JOHNSON & SON, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT S.C. JOHNSON & SON, INC.'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Was summary judgment dismissing Petitioner's Title VII sexual and racial harassment claims appropriately granted and affirmed where: 1) the alleged mistreatment of Petitioner by her coworker was neither sexual nor racial; 2) the undisputed facts confirmed that the coworker directed his coarse language and other rude conduct equally at all coworkers, including white men, white women, black men and black women; 3) the alleged harassing conduct was not severe or pervasive enough to constitute an actionable hostile work environment; and 4) Respondent dealt reasonably with Petitioner's complaints by promptly investigating them and implementing remedial measures reasonably calculated to eliminate the rude conduct?

2. Was summary judgment dismissing Petitioner's race discrimination claim pursuant to 42 U.S.C. § 1981 appropriately granted and affirmed where there was no evidence that Respondent treated Petitioner's complaints any less solicitously because of her race?

RULE 29.6 CORPORATE DISCLOSURE LIST

S.C. Johnson & Son, Inc. has no parent company. S.C. Johnson & Son, Inc. does own less than one hundred percent of certain subsidiary companies. These are:

Name	Country
Johnsonwax del Ecuador S.A.	Ecuador
Shanghai Johnson Ltd.	China
Saudi Johnson Company, Ltd.	Saudi Arabia
Johnson Trading Company, Limited	Japan
Johnson Wax (Egypt) Co.	Egypt
Johnson's Wax (East Africa) Ltd.	East Africa
Johnson Wax Nigeria Limited	Nigeria
Lever Johnson (Consumer Products) Limited	India
Johnson's Wax Ltd.	Ghana
PT SC Johnson & Son (Indonesia) Ltd.	Indonesia
S.C. Johnson Risk Management, Inc.	USA
Johnson Polymer Corporation	Japan
Esuco Beheer B.V.	Netherlands
Johnson Chemical Company	Japan

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent S.C. Johnson & Son, Inc., by its undersigned counsel, respectfully requests this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit for review of the judgment in *Katie R. Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340 (7th Cir. No. 98-2058, Jan. 28, 1999).

COUNTERSTATEMENT OF THE CASE

This is a garden-variety harassment case in which the Petitioner complains about the rude behavior of one of her former coworkers. The Magistrate Judge, the District Court, and the Court of Appeals for the Seventh Circuit all agreed that Petitioner's Title VII claim must be dismissed on summary judgment because there were no facts in the record to show that the coworker was rude to Petitioner *because of* her sex or her race, and, in any event, the coworker's alleged misconduct was not sufficiently severe or pervasive to constitute an actionable hostile work environment. The District Court further concluded that summary judgment dismissing Petitioner's Title VII claim was required because S.C. Johnson acted reasonably in responding to Petitioner's complaints. Finally, the courts below uniformly agreed that Petitioner presented no facts to support a race discrimination claim pursuant to 42 U.S.C. § 1981.

I. BACKGROUND FACTS

A. Introduction Of The Relevant Persons

Petitioner Katie Hardin is a black female. (R. 40, ¶ 1)[1] Respondent S.C. Johnson & Son, Inc. (hereafter "S.C.

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[1] "R. 40" refers to the proposed findings of fact submitted by S.C. Johnson with its motion for summary judgment, which

(*footnote continued on next page*)

Johnson" or the "Company") manufactures and sells various personal care products. S.C. Johnson employed Hardin as an hourly production worker at its factory in Wisconsin beginning in 1972. Between 1972 and 1988, Hardin worked in various divisions or areas of that plant. In 1988, she transferred to line 374, a production line in the aerosol production area, and she remained on line 374 from 1988 through June 1995. (R. 40, ¶¶ 3-6, 29-31)

The only person that Hardin accused of harassing her was a coworker named Nels Andersen. Hardin first encountered Andersen during the time period from 1978 to 1988 when she would occasionally be assigned to the particular area where Andersen then worked. When Hardin transferred to line 374 in 1988, Andersen was already assigned to that line. They both worked on that production line through February 1995. (R. 40, ¶¶ 33, 37-38, 181)

Between 1988 and June 1993, Andersen served as the "line chief" for line 374. (R. 40, ¶ 33) The line chief, like the other production workers, was an hourly employee

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was identified as item 40 in the appellate court record. Local Rule 6.05 of the United States District Court for the Eastern District of Wisconsin requires a movant seeking summary judgment to set forth proposed findings of all facts necessary to the entry of judgment in movant's favor. Local Rule 6.05 permits the party opposing the motion to attempt to raise genuine issues of dispute with any such proposed findings, requiring citation to specific admissible evidence in the record. Any proposed finding that is not disputed by reference to admissible evidence that raises a genuine issue of disputed fact is deemed admitted. In this case, Hardin expressly conceded the vast majority of S.C. Johnson's proposed findings. (*See* R. 48, Plaintiff's Response to Proposed Findings) Hardin's responses that did purport to dispute particular proposed findings were comprehensively addressed and refuted in S.C. Johnson's reply materials. (R. 61) The courts below relied extensively in their opinions on the facts proposed by S.C. Johnson, finding them to be undisputed.

and was not a member of management. The line chief was not the supervisor of the other production workers on the line – the line chief had no authority to hire or fire employees, could not issue discipline, could not do performance evaluations and could not determine any pay increases or other benefits for any of the other employees. A salaried, management employee called the "unit manager" performed those supervisory duties. Rather, the line chief was the lead hourly worker on a production line with duties such as implementing line change-overs, promoting quality and safety, and organizing and scheduling the crew members. (R. 40, ¶¶ 7, 10-12)

In June 1993, the position of line chief was eliminated when S.C. Johnson reorganized its production operations into a work-team operation. Upon the implementation of the work-team concept, the scheduling and other administrative duties previously performed by the line chief then were performed by the member of the team chosen by the other production employees on the team to function in the "administrative role." Like the line chief position, the administrative role was not a supervisory position. Instead, the unit manager, now called the "coach," still was the supervisor of the team members. (R. 40, ¶¶ 13, 16, 18)

B. Facts Concerning Andersen's Alleged Misconduct Toward Hardin And Others

Hardin claimed that Andersen mistreated her before she transferred to line 374 in 1988. She alleged that on some occasions during the 1978-88 time frame when Hardin worked on a sporadic basis with Andersen she occasionally heard Andersen say "What the hell is going on? What the hell are you doing? Shit. Get your head out of your ass" when something went wrong on the production line. Hardin also claimed that Andersen touched her 20 to 25 times on her shoulder and on her arm during the

1978 to 1988 time period before she joined line 374. Hardin testified that she believed Andersen's conduct was racial and sexual harassment of her as far back as 1988. (R. 40, ¶¶ 40, 45, 46) However, Hardin conceded that Andersen did the same things to anybody who was working on the line, including both men and women, and both black and white employees. (R. 40, ¶¶ 40-46)

Hardin alleged that Andersen continued to be rude to her and used coarse language in her presence after she joined line 374 in 1988. For example, Hardin claimed that when a machine on the production line broke down, Andersen would come over and jump in to start doing things to fix the machine, and would curse in anger, using words like "hell," "ass," "fuck," and "shit." She did not allege that Andersen specifically referred to her with these words. Hardin also alleged that when she had problems on the production line, Andersen would say "Why the hell aren't you doing your job? Do you know how to do your job?", and that Andersen would accuse her of taking a long break and ask her "Where in the hell" she was. Hardin claimed that from 1988 to 1993 Andersen used these swear words sometimes on a weekly basis, and sometimes even less frequently when a month would go by without Andersen swearing or cursing. (R. 40, ¶¶ 47-50, 58-59)

Although Hardin alleged that this conduct was gender or race-based harassment of her, she admitted that she had no factual basis for her claim that Andersen's cursing was sex or race harassment other than *her belief* that Andersen cursed in front of the women on line 374 more than he did in front of the men on the line. (R. 40, ¶¶ 61, 67, 68) However, Hardin admitted that she was not in a position to observe Andersen's behavior toward the other employees on line 374 on a regular basis. (R. 40,

¶ 75)[2] Because Hardin could not see or hear what was happening on other parts of the line even when she was working there, she admitted that she had no idea how often Andersen cursed at the women on the line compared to the men. (R. 40, ¶ 73) Hardin conceded, though, that between 1988 and 1993, even from her limited view, she observed Andersen cursing at the men on line 374. Hardin specifically witnessed Andersen curse at white men as well as black men or line 374. Hardin also observed Andersen treating the white women on line 374 the same way he treated her in terms of cursing. (R. 40, ¶¶ 63-64, 69-70, 77) Hardin testified that Andersen's cursing ended sometime in 1993 after he was warned about such behavior. (R. 40, ¶¶ 78-79)[3]

---

[2] A person cannot see what is happening at other stations on line 374 from their work station because the line is very long and covers two stories of the production facility. Moreover, the work environment all around line 374 is noisy, and all employees working on the line and visitors to the line are required to wear earplugs. (R. 40, ¶¶ 71-72, 74)

[3] Hardin erroneously states in her Petition that Andersen continued to curse and yell at black women on the production line even after she complained to her supervisor and filed a written complaint in approximately March 1993. (Pet. at 5) However, this directly contradicts the undisputed facts in the evidentiary record. For example, S.C. Johnson's Proposed Finding of Fact 79 stated:

> Andersen's cursing stopped in 1993 because the Company's management gave Andersen a stern warning and told him that his behavior had to stop, and told him to avoid Plaintiff and not talk to her unless he absolutely had to. (Hardin Depo. p. 122)

(R. 40, ¶ 79) Hardin expressly conceded that there was no dispute and no genuine issue of material fact with respect to this proposed finding. (R. 48, ¶ 79)

(footnote continued on next page)

Hardin admitted that she never heard Andersen make any type of remark that was in any way derogatory to blacks. The other black female workers on line 374 similarly testified that they never heard Andersen make any racial comments. (R. 40, ¶¶ 86, 108-109) The only comment that Hardin claimed Andersen made that Hardin believed was a sexual remark was a single instance in which a woman on the line was having problems with her machine and Andersen allegedly called her a "dumb blonde." Hardin never heard Andersen make any other remarks that Hardin considered to be sexual. (R. 40, ¶¶ 87, 88)

In addition to the cursing, Hardin claimed that, between 1988 and January 1993, Andersen touched her on her neck and her shoulders, would sometimes put his arm around her, and once touched the bottom of her foot. Hardin admitted that Andersen's alleged touching of her stopped by January of 1993. (R. 40, ¶¶ 80, 81)

Hardin did not believe and did not contend that Andersen's touching her was race harassment; however,

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In the same part of the Petition, Hardin erroneously claims that Andersen did not "yell at white women temporary workers and did not curse at other men." (Pet. at 5) This, too, contradicts the undisputed factual record. For example, S.C. Johnson proposed the following findings of fact:

> 70. Hardin observed Andersen curse at white men as well as black men on line 374. (Harden Depo. p. 119)
>
> 76. Between 1988 and 1993, sometimes white women worked on line 374. (Hardin Depo. p. 121)
>
> 77. Plaintiff observed Andersen treating the white women on line 374 the same way he treated plaintiff in terms of cursing. (Hardin Depo. pp. 121-122)

(R. 40, ¶¶ 70, 76-77) Again, Hardin conceded that there was no factual dispute or genuine issue regarding these proposed findings. (R. 48, ¶¶ 70, 76-77)

she claimed it was sexual harassment. Hardin's only bases for her claim that Andersen's touching of her was sexual harassment was that she did not want the touching, that she was a woman, and that she "once" told him to stop. However, Hardin admitted that, even with her limited ability to view Andersen's interactions with other coworkers, she saw Andersen touch the shoulders of at least two other male employees on line 374 during the same time period. (R. 40, ¶¶ 83-85)

C. Hardin's Complaints And S.C. Johnson's Responses

Hardin first made a complaint about Andersen's conduct sometime in 1989, when she, along with co-employees Marsha Russell (white female), Marian Barootian (Hispanic female) and Leevora Perry (black female) together told their supervisor, Richard Konieczko,[4] that Andersen was treating the women on the line poorly by being disrespectful and by cursing and throwing things.[5] The group did not tell Konieczko what particular words Andersen used, but said that they did not see the need for his use of profanity. In response to these comments, Konieczko confronted Andersen, told him that members of the crew did not like his use of profanity, and

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[4] Hardin incorrectly identifies her supervisor to whom she and the three other women complained about Andersen in 1989 as "Ronald Klimowicz." (Pet. at 3-4) Actually, Ronald Klimowicz first became Petitioner's supervisor in approximately early 1993. (R. 40, ¶¶ 101, 102, 92)

[5] Petitioner misleadingly asserts that these women complained to their supervisor that Andersen threw things *at* them. (Pet. at 4) The record contains some evidence that Andersen sometimes threw things around when angry about some disruption to the production process, but there is no evidence that Andersen threw items *at* people, or that anyone complained that he did.

instructed him to stop the unacceptable language in the workplace. After the one instance in the fall of 1989, none of the women on line 374 ever complained again to Konieczko about Andersen. (R. 40, ¶¶ 92, 94, 96, 99)

The next time Hardin made any complaint about Andersen was not until over three years later, in early 1993. (R. 40, ¶ 101) Hardin complained to her supervisor, Ron Klimowicz, that Andersen cursed and yelled at the workers on the line, and that she had told Andersen "Don't touch me anymore." (R. 40, ¶¶ 102, 110, 117-118) Hardin testified that Klimowicz was receptive to her complaint about Andersen. (R. 40, ¶ 114) In response to Hardin's complaint, Klimowicz warned Andersen at a team meeting that any cursing or disrespectful behavior was not acceptable and had to stop, and made Andersen apologize to the team for his cursing and yelling. Klimowicz also issued Andersen a written warning. (R. 40, ¶¶ 104, 123, 127) Klimowicz informed Hardin that he had given Andersen the written warning, and instructed Hardin to tell him if Andersen gave her any more problems. (R. 40, ¶¶ 111, 165) After March 1993, Klimowicz received no further complaints from Hardin about Andersen. (R. 40, ¶ 129)

On March 9, 1993, Hardin spoke to Sherry Johnson in S.C. Johnson's Human Resources Department about Andersen. (R. 40, ¶ 130) Although Hardin's main complaints were that Andersen called her a liar and told her to transfer to another line, Hardin also told Johnson that Andersen used swear words, yelled at her for coming back late from a break, and did not treat the men on the line that way. (R. 40, ¶¶ 134, 138) Over the course of the next few days, Johnson investigated Hardin's complaint by interviewing Hardin's supervisor, Klimowicz, interviewing the alleged harasser, Andersen, and following up with Hardin. (R. 40, ¶¶ 146-154)

On April 13, 1995, Hardin filed a written complaint with Steve Price, who was Johnson's boss in the Human

Resources Department. In this complaint, Hardin claimed she was being sexually harassed, but that written complaint did not contain anything new or different from the substance of the complaint Hardin made orally to Johnson in their March 9, 1993 meeting. (R. 40, ¶¶ 155-158)

Johnson and Price both followed up with Hardin separately and informed Hardin of the way in which her complaint was handled, including the fact that a disciplinary warning had been given to Andersen and was documented in his personnel file. Hardin told both Johnson and Price separately that she was satisfied with the way that the Human Resources Department had handled her complaint. Johnson and Price each told Hardin that she should contact them immediately if anything else should happen. (R. 40, ¶¶ 160-161, 163, 166-167) Hardin never complained again to Johnson or Price.

The next time after the spring of 1993 that Hardin made any complaint to anyone in S.C. Johnson's management about Andersen's conduct was in 1995, two years after her last complaint. Hardin complained to recently appointed Human Resources Director James Frederick in February 1995 that she perceived she was treated differently by Andersen because she was a black woman. (R. 40, ¶¶ 168-169, 171) In response to Hardin's claim, Frederick conducted an investigation that included, among other things, his interviews of the black employees on line 374, both males and females. (R. 40, ¶ 172) ***None of the other black employees interviewed by Frederick indicated that they believed that they were being discriminated against because of their race.*** (R. 40, ¶ 176)

Also in February, 1995 Hardin called the President of the Company, William Perez, to complain about Andersen. Perez told Hardin that he would check into her complaints and would call her back. Perez spoke to Frederick about Hardin's claims and the decision was made to move Andersen to another production line. Frederick also warned Andersen that any further inappropriate

conduct would result in significant further discipline, including termination of his employment. As promised, Perez called Hardin back and informed her that Andersen had been moved and that her complaint was documented in Andersen's file. Hardin testified that she was satisfied with S.C. Johnson's response to her complaint to Perez. She also admitted that, as of February 1995, there was nothing else that she wanted done with respect to Andersen. (R. 40, ¶¶ 178, 180-181, 183-185, 187)

On June 1, 1995, Hardin learned that Mildred Hubbard-Goodwin, a black female coworker, had assigned Andersen to work an overtime shift on line 374 on Saturday, June 3, 1995. Hardin chose not to come to work on June 3, 1995 and suffered no adverse consequences for failing to come to work. (R. 40, ¶¶ 191-195)

In a meeting on Monday, June 5, 1995, with the plant manager, Jim Potochick, and the human resources director, Jim Frederick, among others, Hardin complained about Andersen being assigned for overtime on the same line as she was assigned. Hardin also claimed that Andersen had startled her by coming up behind her in an electric cart and passing within a few feet of her without warning, letting a door slam in front of her, and cutting her car off in the parking lot. Although all of this alleged conduct occurred months earlier, before Andersen had been moved off of line 374 in February 1995, Hardin did not inform the Company of it until this meeting on June 5, 1995. (R. 40, ¶¶ 196-198, 200)

Potochick and Frederick told Hardin that the Company would only rarely assign Andersen to work on the same line, and if it ever happened, Hardin would be informed ahead of time and would be given the option of whether or not to work with Andersen. (R. 40, ¶ 199) Hardin never again raised any complaints about Andersen.

II. THE PROCEEDINGS BELOW

Hardin filed her administrative charge of discrimination in June 1995, followed by her complaint in federal court on September 14, 1995. She alleged that she suffered a sexually and racially hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. She also asserted a race discrimination claim pursuant to 42 U.S.C. § 1981, but did not pursue a hostile work environment theory under this statute. Instead, she alleged only that S.C. Johnson intentionally discriminated against her because of her race by responding to her harassment complaints less aggressively than it would have responded to those complaints if she were a white woman.

On March 9, 1998, United States Magistrate Judge Aaron E. Goodstein issued his recommendation that S.C. Johnson's motion for summary judgment be granted and Hardin's claims be dismissed. With respect to Hardin's Title VII claims, the Magistrate Judge first held that Hardin could only base her claims on alleged harassment occurring within Title VII's 300-day statute of limitations period. He rejected Hardin's argument that the "continuing violation" theory should be used to expand the limitations period, reasoning that because Hardin unequivocally testified that she believed she was a victim of sexual and racial harassment as far back as 1988, she could not sit on her rights and then sue years later. (pp. 24a-26a)[6] The Magistrate Judge then examined the harassment that allegedly occurred within the 300-day limitations period (after August 16, 1994), and held that such conduct was not motivated by Hardin's gender or race. In fact, the Magistrate Judge concluded that the

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[6] For ease of reference, all citations to the prior court opinions in this case will refer to the page numbers of Petitioner's appendices.

undisputed facts showed that Andersen was equally disrespectful to all coworkers – males and females, blacks and whites. (pp. 28a-29a, 37a) The Magistrate Judge also concluded that even if all of the alleged harassment was considered, including the conduct occurring prior to the limitations period, the totality of the alleged misconduct was not sufficiently severe or pervasive to create an abusive working environment. (pp. 29a, 33a, 37a-38a) As to Hardin's § 1981 claim, the Magistrate Judge concluded that Hardin did not present *any* evidence to show that the Company dealt more favorably with any complaint of any similarly-situated white worker than it dealt with her complaints. (pp. 41a, 43a)

The District Court adopted the recommendation of the Magistrate Judge in its entirety, thereby granting S.C. Johnson's motion for summary judgment and dismissing Hardin's claim. (p. 16a) In addition to adopting the various grounds articulated by the Magistrate Judge for the dismissal of Hardin's Title VII claims, (*i.e.*, the alleged misconduct was not "because of" sex or race, and in any event was not severe or pervasive enough to constitute illegal discrimination), the District Court added yet another ground requiring dismissal. The District Court held that its review of the record confirmed that S.C. Johnson acted reasonably in addressing Hardin's complaints about the rude conduct of her coworker Andersen, and therefore the Company could not be liable under Title VII on Hardin's hostile work environment claim. (pp. 15a-16a)

Hardin appealed the dismissal of her case to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the District Court's entry of summary judgment in favor of S.C. Johnson. (p. 13a) Like the courts before it, the Seventh Circuit rejected the continuing violation doctrine based on Hardin's testimony that she believed she was harassed as early as 1988, and the fact that she filed a written harassment complaint

with S.C. Johnson's human resources department in 1993. (p. 6a) Accordingly, the court analyzed the alleged misconduct of Andersen committed within the 300-day statute of limitations period, and concluded that the undisputed evidence demonstrated that this conduct was not committed "because of" Hardin's sex or race. (pp. 9a-10a) Specifically, the court concluded that Andersen's alleged misconduct was neither sexual nor racial in character. (p. 9a) The court also concluded that there was no evidence that Andersen's alleged misconduct, although gender and race neutral on its face, was motivated by gender or race animus. (pp. 9a-10a) In this regard, the court noted the undisputed evidence that Andersen directed the same rude and boorish conduct towards all employees on the line, including white men, white women, black men, and other black women. (pp. 9a, 12a) In addition to the lack of any evidence of any nexus between the alleged misconduct and Hardin's gender or race, the Seventh Circuit affirmed dismissal of Hardin's Title VII claims because the alleged misconduct simply was not severe enough to rise to the level of an illegal, hostile work environment. (p. 10a)[7]

Regarding Hardin's § 1981 claim, the Seventh Circuit determined:

> We need not consider Hardin's hostile work environment claim under sec. 1981. In a submission to the district court, the plaintiff did not raise this argument, and may have even expressly disavowed such a claim. Because of this, the claim is waived, and we need not address its merits.

(p. 13a) Accordingly, the Seventh Circuit analyzed the only theory Hardin had pursued under § 1981 – that S.C.

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[7] The Seventh Circuit then declined to proceed to analyze whether S.C. Johnson's responses to Plaintiff's complaints were sufficiently reasonable. (p. 10a)

Johnson would have responded more favorably to her complaints of harassment if she had been white – and concluded that she offered no evidence that S.C. Johnson had handled complaints from any white employee in comparable circumstances more solicitously. (pp. 12a-13a)

Hardin then filed with the Seventh Circuit a Petition for Rehearing and Suggestion for Rehearing en Banc. The court denied the petition and suggestion without further elaboration.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S FIRST QUESTION PRESENTED IS BASED ON A FAULTY PREMISE, WAS NOT ARGUED OR DECIDED BELOW, INVOLVES NO CONFLICT BETWEEN THE SEVENTH CIRCUIT AND ANY OTHER COURT, AND IS NOT OUTCOME DETERMINATIVE.

A. Petitioner's First Question Presented Relies On A Faulty Premise.

> Petitioner asserts as the first question presented: In analyzing a claim of unlawful discrimination involving the intersection of both race and gender made by a black female employee, was it improper to compare the black female's treatment only with that of black men and white women?

(Pet. at *i*)

This question relies on a faulty premise because none of the courts below limited their comparison of Andersen's alleged mistreatment of Petitioner only to Andersen's alleged mistreatment of other employees who were black men or white women. Rather, all the courts below concluded that the undisputed evidence demonstrated that Andersen subjected *all* employees on the production line to similar rude and boorish treatment such as his cursing and temper tantrums. As Petitioner

notes, this particular production line consisted of some 8 white males, 2 black males, 3 black females and, from time to time, white and Hispanic females. (Pet. at 4) The Seventh Circuit specifically noted that Petitioner testified in her deposition that "Andersen cursed at all employees on the line, white and black, male and female." (p. 9a) Nowhere in its opinion does the Seventh Circuit indicate that it limited the comparisons to just black males and white females, and ignored the circumstances of white males and black females, as Petitioner claims in her question presented. Therefore, the essential premise of her first question presented is false.

B. Petitioner's First Question Presented Also Turns On A Legal Theory That Was Not Adequately Argued, Developed Or Decided In The Court Below.

Yet a second, independent reason that the Petition should be denied on Petitioner's first question presented is that it turns on the claim that the Seventh Circuit's supposed analysis conflicts with an analytical model adopted by the Courts of Appeals for the Fifth, Ninth and Tenth Circuits. (Pet. at 10-17) This claim simply was not sufficiently argued, developed or decided in the courts below to warrant review here.

Petitioner never asked the Seventh Circuit to follow some alleged analytical model from any other circuit. Indeed, nowhere in either her opening brief or her reply brief to the Seventh Circuit did Petitioner even *cite* any of the cases discussed in her Petition as examples of the analytical model the Seventh Circuit supposedly should have followed, i.e., *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995); *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); and *Lam v. University of Hawaii*, 40

F.3d 1551 (9th Cir. 1994). Nor did the Seventh Circuit discuss any of these cases on its own initiative. Not only did Petitioner fail to argue to the Seventh Circuit that it should follow some methodology espoused in any of those cases, but she instead told the Seventh Circuit that *no* case law existed that supported her theory:

> What Hardin's complaint articulates is that she was subjected to this treatment because she was [Black and a woman]. [Hardin] contends that it is the inseparability of both race and gender that amounted to how she was treated. A finding of either race or gender is a find [sic] of discrimination for both. **There is no case law relating to whether Black women for a hostile work environment claim are treated differently simply because of their race.** The Plaintiff contends that this case supports that proposition.

(Br. of Appellant at 24-25, emphasis added)

This issue is particularly unsuitable for and unworthy of Supreme Court review because it was not squarely presented, developed or decided in the court below. A long line of this Court's decisions have emphasized the need for a well-developed lower court record on any particular issue as a necessary prerequisite to review by this Court. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court"); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but not in court of appeals is not properly before the United States Supreme Court); *see also* Robert L. Stern, et al., *Supreme Court Practice*, at 344 n.92 (7th ed. 1993) (and cases cited therein). The United States Supreme Court is not the appropriate place for Petitioner now to launch her new argument.

C. In Any Event, The Analysis Of The Seventh Circuit In This Case Does Not Conflict With That Of Any Other Court Of Appeals Case Cited By Petitioner.

Yet a third, independent reason that the Petition should be denied on Petitioner's first question presented is that there is no conflict between the Seventh Circuit's analysis in this case and the holding or analysis of any of the other courts of appeals in the cases cited by Petitioner. For example, neither the holding nor the analysis in *Steiner*, 25 F.3d 1459, conflicts with the holding or analysis in this case because there is a fundamental and dispositive difference between the cases. The Ninth Circuit in *Steiner* concluded that the evidentiary record demonstrated that the harasser's abuse of women was qualitatively different than his mistreatment of men in that his abuse of women specifically relied on sexual epithets, offensive and explicit references to women's bodies, and overtly sexual conduct. *Id.* at 1463. On that record, the court concluded that there was sufficient evidence that the harasser's mistreatment of female employees was *because of* their gender. In this case, on the other hand, all of the courts have agreed that the undisputed factual record demonstrates that Andersen treated everyone the same – there was no differential treatment of Petitioner at all. Moreover, unlike the harasser in *Steiner* whose harassment of female coworkers was overtly sexual (thus evidencing that the harassment was because of their sex), none of Andersen's misconduct was sexual or racial in nature. Therefore, the Seventh Circuit did not utilize any analysis that in any way rejects or conflicts with that in the *Steiner* case.

To argue that the *Steiner* case is similar to the case at bar, Petitioner flatly contradicts the findings and conclusions of the Seventh Circuit, the District Court and the Magistrate Judge by claiming that "Andersen's abuse of

Black females was different from that of Black males and white females." (Pet. at 11) The undisputed evidentiary record – the basis for the conclusions of all of the courts below – contained no facts of differential treatment of any kind, whether based on sex, race or a combination of the two. Petitioner cites to the affidavit of Andersen's former girlfriend, Margaret Brannon, which claimed that Andersen made racially and/or sexually derogatory comments in private conversations with Brannon at times between 1991 and 1994 during their intimate relationship. Whereas the harasser in *Steiner* made sexually vulgar comments directly to the victims and thereby polluted their work environment, these derogatory comments alleged by Brannon were made in private to Brannon, and were never heard or known by the Petitioner. Indeed, Petitioner and the two other black female workers on line 374 all confirmed in their testimony that *they **never** heard Andersen make any racially or sexually derogatory comments.* (R. 40, ¶¶ 86-88, 108-109)

The other cases cited by Petitioner are similarly inapplicable. For example, *Jefferies*, 615 F.2d 1025, did not involve a hostile work environment claim at all. *Jefferies* instead involved a claim by a black female that her employer failed to promote her because of her race and sex. The Fifth Circuit made the unremarkable observation that there may be illegal discrimination against a black woman, even in the absence of evidence of discrimination against black men or white women. *Id.* at 1032. The consequence of the *Jefferies* holding is that the mere fact that the employer can show favorable treatment of other employees who share one, but not both, of the plaintiff's protected characteristics does not preclude that plaintiff from establishing her discrimination claim by proving the employer's intent to discriminate based on the combination of those protected characteristics.

Nothing that the Seventh Circuit did in this case in any way conflicts with the holding or analysis in *Jefferies*.

First, in analyzing Petitioner's hostile work environment claims, the Seventh Circuit was not making a disparate treatment analysis based on the *McDonnell Douglas* proof paradigm at all, so *Jefferies* is distinguishable. In a discriminatory treatment case like *Jefferies*, the adverse employment action is usually undisputed. In *Jefferies*, for example, it was undisputed that the employer denied the plaintiff a promotion. Thus, the employer's intent that motivated that adverse action was the key issue. In this hostile work environment case, on the other hand, Petitioner never established that she suffered an adverse action (i.e., differential treatment) because Andersen treated everyone the same. Second, the Seventh Circuit *did* compare the conduct that Andersen directed toward Petitioner to the conduct that he directed toward all other employees, including black men, white men, black females and white females.[8]

Nor does the Seventh Circuit's holding or analysis in any way conflict with the holding or analysis in *Hicks*, 833 F.2d 1406. In *Hicks*, a black female brought a race and sex harassment claim under Title VII. The Tenth Circuit, citing the recently decided case of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), remanded the case to the district court for reconsideration of the plaintiff's hostile work environment sexual harassment claim, without expressing any view on the merits of that claim. *Id.* at 1417. The court noted, however, that in evaluating the pervasiveness of the harassment suffered by the plaintiff, it would be permissible (but not mandatory) for the trial

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[8] Petitioner cites *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969), but makes no argument that the Seventh Circuit's holding or analysis in this case conflicts with the Fifth Circuit's holding or analysis in that case. A review of the *Phillips* case confirms there is no conflict with the case at bar. Petitioner also fails to point out that the case was vacated. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

court to aggregate evidence of racial harassment with evidence of sexual harassment to determine if the aggregated harassment was sufficiently severe or pervasive to be actionable. *Id.* at 1416.

Nothing that the Seventh Circuit did in this case conflicts with *Hicks*. The court held that all of the alleged harassment, *taken together*, was not sufficiently pervasive to constitute an illegal hostile working environment in violation of Title VII. (p. 10a) The Seventh Circuit did not refuse or fail to aggregate instances of race harassment with instances of sex harassment in determining the pervasiveness issue. Rather, the court clearly took into account all of the alleged misconduct in the relevant timeframe and concluded that the alleged misconduct was not sufficiently pervasive to establish a violation of Title VII. None of that analysis conflicts in any way with *Hicks*.

Finally, nothing in the Seventh Circuit opinion in this case conflicts with *Lam*, 40 F.3d 1551. Like the *Jefferies* case, *Lam* did not even involve hostile work environment claims. Instead, the plaintiff in *Lam* alleged that her employer failed to promote her on the basis of her race, sex and national origin. *Id.* at 1554. Following *Jefferies*, the Ninth Circuit held that when a plaintiff is claiming race and sex bias, the mere fact that the employer can show favorable treatment of other employees who share one, but not both, of the plaintiff's protected characteristics does not preclude that plaintiff from establishing her discrimination claim by proving the employer's intent to discriminate based on the combination of those protected characteristics.

Nothing that the Seventh Circuit did in this case conflicts with *Lam*. First, the cases are dissimilar because *Lam* (like *Jefferies*) did not even involve any hostile work environment claims or discussion of the appropriate analysis of those types of claims. Second, the Seventh Circuit did not look at the sex harassment claim in isolation and

dismiss it because the alleged harasser treated other persons of the same sex (but a different race) similarly. Nor did the Seventh Circuit isolate the race harassment claim and dismiss it by finding that the alleged harasser treated other persons of the same race (but a different gender) similarly. Instead, the Seventh Circuit, like the District Court and the Magistrate Judge before it, concluded that the undisputed facts showed that the alleged harasser mistreated all of the employees on the production line similarly. This included white males – those employees who shared neither race nor gender characteristic of the Petitioner.

In sum, Petitioner's attempt to argue that the Seventh Circuit analysis in this case is somehow in conflict with case law from other circuits is illusory. There is no conflict between the circuits that needs review and reconciliation by this Court in this case.

D. Additionally, And In Any Event, Petitioner's First Question Presented Is Insufficient To Warrant Granting A Writ Because The Issue Presented Is Not Outcome Determinative.

Even if Petitioner had properly characterized the analysis of the Seventh Circuit (which she did not), and even if Petitioner had urged the Seventh Circuit to follow the analysis of the Fifth, Ninth, Tenth or some other circuit (which she did not), and even if the Seventh Circuit's analysis conflicted with case law from other circuits (which it does not), this Court should not grant *certiorari* on Petitioner's first question presented because the issue therein would not change the outcome in this case. Petitioner's entire argument about the Seventh Circuit's reference to similar mistreatment by Andersen of all the other employees on the production line goes only to the very first step in any hostile work environment analysis – determining whether the alleged harassing

conduct was committed because of the Petitioner's sex and/or race. Even if Petitioner could establish this fact, she would still lose the case. Simply showing some act of harassment that is sexual or racial in purpose does not establish a violation of Title VII – a plaintiff then has to satisfy the pervasiveness standard to keep a hostile work environmental claim alive.

> Of course, . . . not all workplace conduct that may be described as "harassment" affects a "term, condition or privilege" of employment within the meaning of Title VII. . . . For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."

Meritor, 477 U.S. at 67; *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

In this case, after concluding that there was no evidence that the alleged harassment within the statute of limitations period was motivated by discrimination, the Seventh Circuit *also* expressly concluded that those allegedly harassing acts "were insufficiently severe to give rise to a hostile environment." (p. 10a) This conclusion was also reached by the District Court and the Magistrate Judge. (p. 16a and p. 29a) Indeed, the Magistrate Judge concluded that the totality of all of Andersen's alleged sexual harassment of the Petitioner, including those acts which fell outside the statute of limitations period, was "not sufficiently severe or pervasive so as to alter the conditions of Hardin's working environment and create an abusive working atmosphere." (p. 33a)

Petitioner offers no challenge to the Seventh Circuit's holding that Andersen's alleged misconduct does not reach the minimum threshold necessary to establish a violation of Title VII. Therefore, even if Petitioner somehow could prevail on her arguments regarding the first

step in the analysis, this would still not warrant a reversal of the judgment below.

Another reason Petitioner's first issue is not outcome determinative is that the District Court held that S.C. Johnson could not be liable to Petitioner on her Title VII claims in any event because the Company acted reasonably in addressing her complaints. (pp. 15a-16a)[9] This Court recently reconfirmed the broad unanimity among the holdings of district courts and courts of appeal that an employer is liable for coworker harassment only if it knew or should have known of the conduct, and negligently failed to take prompt and appropriate corrective action. *Faragher v. City of Boca Raton*, 524 U.S. 775, ___, 118 S. Ct. 2275, 2289 (1998) In this case, no matter how the harassing acts are analyzed, and even if one concluded they constituted illegal harassment by Andersen, Petitioner would still lose her case at the summary judgment stage because S.C. Johnson acted reasonably in response to her complaints. This was the express conclusion of the District Court, and nothing raised by Petitioner now challenges or affects that conclusion. Therefore, Petitioner's Title VII claims still fail as a matter of law even if Petitioner were somehow to prevail on her first question presented in her Petition. Accordingly, that issue is not worthy of review by this Court.

II. PETITIONER'S SECOND QUESTION PRESENTED SIMILARLY RAISES NO ISSUE THAT MERITS REVIEW BY THIS COURT.

In her second question presented and supporting argument, Petitioner now argues, for the first time in this

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[9] The Seventh Circuit found it unnecessary to reach and analyze this issue because Petitioner "cannot establish that she was subjected to either gender or racial discrimination creating a hostile work environment." (p. 10a)

case, that Andersen was a supervisor and therefore that the Seventh Circuit erred by not analyzing her claims pursuant to the standards set forth in *Faragher* and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

A. Petitioner's Second Question Presented Relies On A Faulty Premise That Misstates The Undisputed Facts.

Petitioner's second question presented, and section II of Petitioner's argument, both rely on Petitioner's assertion that Andersen was Petitioner's supervisor. Working from that necessary premise, Petitioner argues that the Seventh Circuit improperly ignored the standards for employer liability based on discriminatory conduct of supervisors set forth in *Ellerth* and *Faragher*. However, this fundamental premise of Petitioner's argument is wrong and contradicts the undisputed facts.

As part of its submission in support of its motion for summary judgment, S.C. Johnson offered the following proposed finding of fact:

> The line chief, like the other service persons, was an hourly worker and was not a member of management. The line chief had some scheduling and production-related duties, but was not the supervisor of the other persons on the line.

(R. 40, ¶ 10) In response to this proposed finding, Petitioner confirmed: "No genuine issue of material fact exists." (R. 48, ¶ 10) Additionally, other undisputed facts similarly confirm that the line chief was not a managerial position, had no authority to hire or fire employees, could not issue discipline of his own authority, could not do performance evaluations of the other service persons, and could not determine any pay increases or other benefits for any of the service persons. (R. 40, ¶¶ 11, 12; R. 48, ¶¶ 11, 12) Moreover, the undisputed facts confirm that at no time during the limitations period relevant to Petitioner's Title VII claims was Andersen even a line chief.

The position of line chief ended in the spring of 1993 when S.C. Johnson reorganized its workforce into work teams. (R. 40, ¶¶ 13, 18) From the spring of 1993 forward, Andersen was merely one of the co-equal members of the team. In fact, the "administrative role" – the person responsible for the team's administrative duties such as scheduling production and breaks that were formerly handled by the line chief – was mainly handled by one of the team members who was a black female. (R. 40, ¶ 35)

Without any citation to the record, and without any reference to any supporting facts, Petitioner now simply makes the conclusory statement that Anderson was her "supervisor." (Pet. at 18) Petitioner's entire second question presented should be rejected because this unsupported assertion simply is not true. Petitioner has already conceded in the evidentiary record that Andersen, even when he was a line chief, was not her supervisor. In sum, Petitioner's unsupported assertion that this is a case involving harassment by a supervisor subject to the analytical standards set forth in *Ellerth* and *Faragher* is misleading and disingenuous.

B. The Issue In Petitioner's Second Question Presented Was Not Argued, Developed Or Decided In The Court Below.

A second, independent reason Petitioner's second question should not be accepted for review is that Petitioner never argued to the Seventh Circuit that her Title VII claims should be analyzed pursuant to the standards set forth in *Ellerth* and *Faragher*. This is remarkable because this Court's opinions in *Ellerth* and *Faragher* were issued on June 26, 1998. Petitioner filed her opening brief with the Seventh Circuit weeks later in July 1998. Nowhere in that brief did the Petitioner argue that Andersen was a supervisor. In fact, Petitioner did not even cite either *Ellerth* or *Faragher*.

Because Petitioner in her opening brief to the Seventh Circuit referred in passing to Andersen as a supervisor, S.C. Johnson in its opposition brief argued that this reference was a misstatement of the undisputed factual record, and that Andersen was not a supervisory employee. (Response Brief at 24, n.9) Despite this express challenge to the notion of Andersen as a supervisor, Petitioner did not in her reply brief attempt to argue that Andersen was a supervisor. Nor did Petitioner cite either *Ellerth* or *Faragher* in that reply brief. Similarly, Petitioner did not cite *Ellerth* or *Faragher* in her Petition for Rehearing and Suggestion for Rehearing en Banc that she filed in February 1999.

Obviously, Petitioner's argument that Andersen was a supervisor and that the Seventh Circuit improperly failed to follow the standards set forth in *Ellerth* and *Faragher* is a brand-new notion. Petitioner wants this Court to correct a supposed error that was never made, on an issue that she never raised. Clearly, this is not the kind of well-developed and fully-litigated issue that is appropriate for Supreme Court review. *See Youakim*, 425 U.S. at 234; *Delta Air Lines, Inc.*, 450 U.S. at 362. Because Petitioner never asserted that the *Ellerth* or *Faragher* standards applied to this case, there is no decision from the lower court on this issue that needs or justifies review.

C. Petitioner's Argument On Her Second Question Presented Rests On Patently Incorrect Characterizations Of The Law.

In argument section II of the Petition, Petitioner argues at some length that the Seventh Circuit erred by applying Title VII's 300-day statute of limitations to her Title VII claims. (Pet. at 22-23) Although it is not entirely clear how that statute of limitations analysis relates to the gist of Petitioner's argument in this section (regarding

Andersen's status as an alleged supervisor and the application of *Ellerth* and *Faragher*), Petitioner's argument in any event is plainly wrong. First, Petitioner amazingly asserts that "the 300-day limitation period is not a statutory approach; it is a judicial creation." (Pet. at 21) This, of course, is not true. Title VII's statute of limitation is codified at 42 U.S.C. § 2000e-5(e). Petitioner asks the Court to read the statute of limitations section right out of the statute.

Second, Petitioner incorrectly asserts that the Seventh Circuit relied on the continuing violation doctrine to exclude from its consideration certain "evidence of discriminatory treatment." (Pet. at 21) The Seventh Circuit did no such thing. Directly contrary to Petitioner's characterization, the Court merely applied the statute of limitations to define the relevant time period, and rejected Petitioner's request that it apply the continuing violation doctrine to reach back beyond the limitations period. (pp. 6a-7a) The Court appropriately determined that the continuing violation doctrine was inapplicable to the facts in this case because it is clear beyond any possible dispute that Petitioner believed she was a victim of harassment years before she filed her complaint with the appropriate state agency. (*Id.*) She said so in her deposition testimony. (R. 40, ¶¶ 40, 45-46) Accordingly, for purposes of assessing her Title VII claims, she could not reach back to earlier time periods and rely on evidence of events that occurred prior to the 300 days before she filed her complaint. (*Id.*) Nothing the Seventh Circuit did in this analysis was in any way extraordinary, and not even Petitioner claims that the Court's analysis or holding in this regard conflicts with any analysis or holding of this or any other court.

Also within argument section II of her Petition, Petitioner argues about the dismissal of her claim pursuant to 42 U.S.C. § 1981. She claims that the Seventh Circuit erred by failing to evaluate her hostile work environment claim

pursuant to § 1981 based on evidence of Andersen's misconduct going back over six years – the limitations period applicable to § 1981 claims filed in Wisconsin – rather than just the 300-day period applicable under Title VII. (Pet. at 24) This, too, is wrong because, as found by Seventh Circuit, Petitioner *waived* any hostile work environment claim under § 1981. (p. 13a) Instead, the only liability theory asserted by Petitioner relevant to her race discrimination claim pursuant to § 1981 was the disparate treatment theory that S.C. Johnson would have responded even more favorably to her complaints if she were white. Like the District Court and Magistrate Judge before it, the Seventh Circuit held that Petitioner's § 1981 claim failed as a matter of law because Petitioner failed to produce *any* evidence to create any inference that S.C. Johnson treated her less favorably because of her race. (pp. 12a-13a) In any event, there is clearly no issue presented here that would require or justify review by this Court. Petitioner's entire argument regarding her § 1981 claim exclusively represents fact-bound issues, and her suggestion, albeit wrong, that the Seventh Circuit erred in evaluating her § 1981 claim. There is no issue of national importance, and no need to advance or clarify the law in some important aspect, presented by Petitioner's § 1981 claim, or by Petitioner's second question presented.

D. Furthermore, Petitioner's Second Question Presented Seeks Only The Correction Of Alleged Error.

Petitioner asks in her second question presented whether racial and sexual comments privately made by a supervisory employee, even if not directed to or heard by the Petitioner, are relevant to the issue of the general pervasiveness of harassment in the workplace. (Pet. at *i*) As articulated, this convoluted question mixes multiple legal issues, and does not merit or justify review. First, as

already discussed, the alleged harasser in this case was not a supervisor. Second, this issue was not presented to or decided by the Seventh Circuit. Third, even if this question was factually correct (which it is not), and even if it was developed and decided in the court below (which it was not), Petitioner's claims amount to nothing more than a request that this Court correct allegedly erroneous factual findings or some alleged misapplication of a properly stated rule of law. As confirmed by this Court's Rule 10, these are not appropriate considerations justifying the granting of a writ. There is no alleged conflict among the lower courts that requires reconciliation and guidance, and there is no important issue of public policy to be decided or advanced raised by Petitioner's second question presented.

CONCLUSION

For all of the foregoing reasons, the Respondent S.C. Johnson & Son, Inc. respectfully submits that the Petition for a Writ of Certiorari should be denied.

Dated this 12th day of August, 1999.

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